

# Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

SJC NO. FAR-

APPEALS COURT NO. 2023-P-480

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COMMONWEALTH

v.

WARREN DUNN

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ON APPEAL FROM ORDERS OF THE  
PLYMOUTH SUPERIOR COURT

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**WARREN DUNN'S APPLICATION FOR  
DIRECT APPELLATE REVIEW**

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MAY 2023

**REQUEST FOR DIRECT APPELLATE REVIEW  
PURSUANT TO MASS. R. APP. P. 11**

Pursuant to Mass. R. App. P. 11, Defendant-Appellant Warren Dunn requests the Supreme Judicial Court to directly review his appeal. This case presents novel questions touching on the First and Fourth Amendments of the U.S. Constitution, as well as articles 14 and 16/77 of the Massachusetts Declaration of Rights. Specifically, when the police seek a warrant to search for child pornography, may the magistrate rely entirely on a police officer's summary description of purportedly lewd images of minors that the suspect previously downloaded? The Court should rule that the description here – that the penis was “focus” of the photos – was inadequate. Moreover, the Court should use Mr. Dunn's case as an opportunity to clarify that, whenever possible, magistrates must personally view purportedly lewd images before issuing search warrants or criminal complaints.

**STATEMENT OF PRIOR PROCEEDINGS**

On March 12, 2021, a Plymouth County grand jury returned two indictments against Mr. Dunn for possession of child pornography, second offense (G.L. c. 272, § 29C). RA.010-13.<sup>1</sup>

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<sup>1</sup> “RA.010-13” refers to pages 10-13 of the record appendix filed in the Appeals Court, and other citations to the record appendix follow this format.

Mr. Dunn subsequently moved to suppress digital evidence seized from his computer. On September 30, 2021, he filed both a Motion To Suppress Search Warrant and a Motion For *Franks* Hearing, accompanied by a joint memorandum of law. RA.017-58. The Commonwealth filed an opposition brief on October 18, 2021. RA.059-68. A non-evidentiary hearing was held on November 1, 2021. In a January 4, 2022 decision, the motion judge (Buckley, J.) denied Mr. Dunn's motion to suppress and declined to hold a *Franks* hearing. RA.069-79.

On August 26, 2022, Mr. Dunn pleaded guilty to all indictments, reserving his appellate rights as to denial of the motion to suppress and the denial of a *Franks* hearing. RA.080-81. The Commonwealth agreed with Mr. Dunn that "[r]eversal of the above ruling [denying the motion to suppress and the request for a *Franks* hearing] would render the Commonwealth's case not viable in the respective matter." RA.081. The plea judge (Davis, J.) sentenced Mr. Dunn to 5 years imprisonment followed by 3 years of probation. RA.008.

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The addendum to this application contains a full copy of the record appendix.

On September 9, 2022 Mr. Dunn filed a notice of appeal of the denials of his Motion To Suppress Search Warrant and Motion For *Franks* Hearing. RA.082-83.

Appellate counsel subsequently moved to inspect the aforementioned two photos that the Commonwealth had relied on when obtaining a search warrant of Mr. Dunn's house. RA.084-85. In connection with this motion, Judge Davis ordered the Commonwealth to produce the two photos to the Court. Judge Davis subsequently ordered the two photos made part of the case file, subject to an impoundment order. RA.085.

The case entered in the Appeals Court on May 9, 2023, under docket number 2022-P-480. Mr. Dunn filed his brief and appendix in that court on May 11, 2023.

### **FACTS RELEVANT TO APPEAL**

On June 2, 2020 the state police filed an application for a warrant to search 1187 Nantasket Ave, Apt. 2 in Hull, Massachusetts and any electronic devices found on the property. RA.039-55. In his affidavit in support of the search warrant ("Affidavit"), Trooper Gerald Donovan stated that Microsoft had notified the National Center for Missing and Exploited Children ("NCMEC") of two

suspicious uploaded files. RA.043-44. NCMEC, in turn, had contacted the state police with a CyberTipline Report enclosing the two photos. RA.043-44. After an administrative subpoena issued to Comcast, the state police learned that the device used to download the two photos was associated with Mr. Dunn. RA.045. The state police then sought a search warrant for Mr. Dunn's house and electronic devices.

In his Affidavit, Trooper Donovan described the two images received with the CyberTipline Report as follows:

FileName: 2c8d5e1 7-12c5-412e-b359-914a3e64868a.jpg

Description: This image depicts a pubescent male standing completely naked with the focus of the image on the young boy's penis. The young boy is approximately 13 to 15 years of age.

FileName: c41d561a-95c9-4939-ab60-6cd12b8b4a6a.jpg

Description: This image depicts a pubescent male standing completely naked with the focus of the image on the young boy's penis. The young boy is approximately 13 to 15 years of age.

RA.045. A magistrate signed the search warrant on June 3, 2021 and the police executed it the same day. RA.038, 056. A thumb drive and cell phone seized from Mr. Dunn's house were later found to contain child pornography. RA.056; Aug. 26, 2022 Trscp. at 24-25. Mr. Dunn also allegedly made incriminating statements to the police while they were at his house. Aug. 26, 2022 Trscp. at 24. Mr. Dunn

was charged with, and admitted to, possession of child pornography. RA.080, 010-13; Aug. 26, 2022 Trscp. at 24-27. No charges were brought against Mr. Dunn in connection with the initial two photos forwarded to the police by NCMEC.

### **ISSUES OF LAW RAISED BY THE APPEAL**

All of the issues presented in this appeal were preserved by Mr. Dunn in pre-trial motions in the proceeding below:

1A. Did the magistrate err by finding probable cause based solely on Trooper Donovan’s characterization that the penis was the “focus” in the two photos, without ever viewing the photos, (which were not attached to the search warrant affidavit)? (Suggested answer: Yes.)

1B. Should magistrates be required to view purportedly lewd photos of minors prior issuing search warrants, where the existence of probable cause turns on the lewdness of the images? (Yes.)

2A. Mr. Dunn alleged that the trooper who obtained the warrant falsely stated in his affidavit that in both photos “the focus of the image [is] the young boy’s penis.” Did the motion judge err in denying Mr. Dunn’s *Franks* motion without even looking at the photos? (Yes.)

2B. Are the two photos ***not*** lewd, as a matter of law? (Yes.)

2C. Absent the trooper’s description of the “focus” of the two photos, was there any other evidence presented to the magistrate that established probable cause to search Mr. Dunn’s house? (No.)

## **ARGUMENT**

### **I. The Motion To Suppress Should Have Been Allowed.**

#### **A. Trooper Donovan's Summary, Conclusory Description Of The Two Photos Did Not Create Probable Cause To Search Mr. Dunn's House.**

This case presents an issue of apparent first impression in Massachusetts: Whether a magistrate may rely on a summary description of a purportedly lewd image when determining whether probable cause exists to search for child pornography. The First Circuit, however, considered this very issue in *United States v. Brunette*, 256 F.3d 14 (2001). The magistrate in *Brunette* had issued a search warrant based on a U.S. Customs agent's averment that he had viewed "photographs of a pre-pubescent boy lasciviously displaying his genitals." *Id.* In language applicable to this case, the First Circuit held that the agent's terse, conclusory description did not establish probable cause:

As the district court recognized, "the identification of images that are lascivious will almost always involve, to some degree, a subjective and conclusory determination on the part of the viewer." That inherent subjectivity is precisely why the determination should be made by a judge, not an agent. The Fourth Amendment requires no less.

*Id.* at 18 (citations omitted). Here, Trooper Donovan did not aver that the photographs contained any frankly sexual conduct that would

bring the two images within the ambit of G.L. c. 272, § 29C(i) through (vi). In an apparent effort to show that the two photos fell under § 29C(vii), which criminalizes “lewd” images of children, Donovan described the penis as the “focus” of the two photos – but this is just as vague and subjective as the Customs agent’s description of the boy “lasciviously displaying his genitals” in *Brunette*. If nothing else, there should have been “at least ... a detailed, factual description” of *why* the penis was the focus. *Brunette*, 256 F.3d at 18.

This Court should adopt the First Circuit’s persuasive reasoning in *Brunette* and conclude that the magistrate here could not find probable cause based on Donovan’s conclusory, bare-bones allegation.<sup>2</sup> The Rhode Island Supreme Court has recently done so. *See State v. Reisner*, 253 A.3d 1273, 1274-83 (R.I. 2021)(adopting *Brunette* and holding that magistrate could not find probable cause to search for child pornography based on state trooper’s description of intercepted image as “prepubescent female on the beach removing her bathing suit exposing her genitals”).

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<sup>2</sup> The *Brunette* Court ultimately found that the government got the benefit of the good faith exception to the exclusionary rule. *See* 256 F.3d 19-20. But there is no good faith exception under Massachusetts law. *See Commonwealth v. Fredericq*, 482 Mass. 70, 84-85 (2019).



The Court should likewise reject the motion judge's attempts to distinguish *Brunette*. Judge Buckley described Trooper Donovan's description of the two photos as "factual, rather than legal," RA.075, but describing something as the "focus" of a photo is a characterization, not a recitation of fact. Far more factual detail is needed to provide an objective basis for the claim. The motion judge also found that Microsoft's and NCMEC's flagging of the two photos provided further evidence that they were lewd, but this too was error. Neither the motion judge nor this Court know anything about the processes Microsoft and MCMEC uses to screen digital images as potential child pornography, let alone how reliable those processes are. On this record, Microsoft's and NCMEC's prior actions added nothing to Donovan's summary description of the photos. Finally, the motion judge found that Mr. Dunn's prior conviction for possession of child pornography bolstered the Commonwealth's case for probable cause. But the question for the magistrate was whether the two photos were lewd. Mr. Dunn's prior conviction could have no bearing on this determination. "[C]hild pornography is not created when the [viewer] derives sexual enjoyment from an otherwise innocent photo[graph]."

*Commonwealth v. Rex*, 469 Mass. 36, 48 n.16 (2014)(citations omitted)..

**B. Magistrates Should Personally View Images Whose Alleged Lewdness Is The Basis For A Probable Cause Determination.**

Although not strictly necessary for the relief Mr. Dunn seeks on appeal, this Court should adopt a rule pursuant to articles 14 and 77 of the Massachusetts Constitution requiring that purportedly lewd images be attached to a search warrant affidavit and reviewed by a magistrate before they can create probable cause for a search.<sup>3</sup> While it may be adequate for an affidavit to aver that images depict apparent minors engaging in sexual intercourse or other conduct set out in G.L. c. 272, § 29C(i) through (vi), given that the conduct in these subsections is well defined, more should be required to establish an image is “lewd” under G.L. c. 272, § 29C(vii). The concept is inherently subjective and great detail will often be needed to explain why a given image is lewd. *See, e.g., Commonwealth v. Sullivan*, 82 Mass. App. Ct. 293, 300-01 (2012)(detailed, paragraph-long description of photo and why it was lewd). As a practical matter,

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<sup>3</sup> Although not relevant to Mr. Dunn’s case, if an allegedly lewd image is the basis for child pornography charges, then by the same reasoning the image should be attached to the application for criminal complaint.

police officers seeking a warrant will seldom provide this level of detail.

While the government's interest in protecting children from exploitation is unquestionable, non-lewd images of nudity are entitled to free speech protections, *see Rex*, 469 Mass. at 41-44; *Commonwealth v. Provost*, 418 Mass. 416, 423 (1994), so an erroneous decision that a given image constitutes a "lewd exhibition of the unclothed genitals," G.L. c. 272, § 29C(vii), will abridge protected expression. The decision should therefore be made by neutral magistrates, unmediated by law enforcement.

## **II. The Motion For A *Franks* Hearing Should Have Been Allowed And Resulted In Suppression.**

This Court has explained that a "defendant is entitled to a *Franks* hearing only if he makes two 'substantial preliminary showing[s].'" *Commonwealth v. Andre*, 484 Mass. 403, 407 (2020):

First, the defendant must demonstrate that the affiant included a false statement knowingly and intentionally, or with reckless disregard for the truth or intentionally or recklessly omitted material in the search warrant affidavit. Second, the defendant must show that the allegedly false statement is necessary to the finding of probable cause, or that the inclusion of the omitted information would have negated the magistrate's probable cause finding...

*Id.* at 407-08 (citations and internal quote marks omitted). This Court reviews a motion judge’s failure to hold a requested *Franks* hearing for abuse of discretion. *See Commonwealth v. Perez*, 87 Mass. App. Ct. 278, 284-85 (2015). As discussed below, Mr. Dunn made a sufficient showing to prompt the motion judge to review the photos in question, and her failure to do so was an abuse of discretion.

**A. The Judge Erred By Denying The Motion For A *Franks* Hearing Without Even Viewing The Two Photos.**

The defense made a “sufficient preliminary showing” that Trooper Donovan materially misrepresented the photos when defense counsel described them in detail in the motion for a *Franks* hearing and explained how the penis was not the focus of either image, and therefore neither photo was lewd or could create probable cause to search for child pornography. As noted, the two photos were impounded and duplication was forbidden, so counsel could not attach copies to her motion. RA.014-16. As she noted in a footnote to the motion, the court could view them at a hearing. RA.019. Of course, if the motion judge was unsure whether a full *Franks* hearing was necessary, she could have directed one of the parties to provide sealed

copies of the photos to her in chambers – just as Judge Davis later did during post-conviction proceeding. RA.084

Judge Buckley’s rationale for denying a *Franks* hearing does not withstand analysis. Earlier in her opinion, she had attempted to distinguish *Brunette* on the ground that Trooper Donovan’s description was “factual, rather than legal,” but when considering the *Franks* argument she dismisses the challenge to the veracity of his description as “merely ... a different interpretation of what the images depict.” The description of the “focus” of a photo cannot be both “factual” and “merely ... interpretation.”

The motion judge’s treatment of the *Franks* issue evinces a seeming disregard for the First Amendment and article 16 aspects of the case, as well as her duty to independently ensure that constitutionally protected materials were not used to show “probable cause” that a crime had been committed. *See Brunette*, 256 F.3d 17-19 (court must independently review purported child pornography when it is basis for search warrant); *Commonwealth v. Bean*, 435 Mass. 708, 714 (2002)(court must independently review record to ensure judgment does not abridge protected speech); *Commonwealth v. Moniz*, 338 Mass. 442, 446-447 (1959)(same); *Pereira v.*

*Commissioner of Social Servs.*, 432 Mass. 251, 258 (2000)(same).

This duty cannot be delegated to police officers, child advocacy organizations, Microsoft, or anyone else.

**B. This Court Should Itself View The Two Photos And Find That They Are Not Lewd As A Matter Of Law.**

Based on the authority just cited, this Court should order transmission of the two photos from the Superior Court and make its own independent assessment of them. *See* note 2 above. Applying the factors discussed in *Commonwealth v. Rollins*, 470 Mass. 66, 76-78 (2014), the so-called *Dost* factors,<sup>4</sup> there is nothing suggestive about the setting (outdoors) or the boys' poses (wading in a pond, and holding a rock). The boys do not suggest either "sexual coyness" or "willingness to engage in sexual activity." Crucially for this appeal, while the boys are nude, the penis is not the "focus" of either photo. The composition of the photos does not draw attention to the genitals. Neither boy is doing anything to draw attention to his penis. The boys do not have erections. If the penis is the "focus" of these photos, then it is the focus of any image of a naked male. Trooper Donovan's descriptions of the photos were false.

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<sup>4</sup> *See United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986).

Moreover, they were made in reckless disregard of the truth.

“A statement is made in reckless disregard for the truth if the affiant had no reasonable grounds for believing the statement, or if he failed to take readily available steps to confirm or dispel whether the statement was true.” SUPPRESSION MATTERS UNDER MASSACHUSETTS LAW at § 10-6[d][2][i]. Here, Donovan had no “reasonable grounds” to believing that the penis was the “focus” of the two photos. Given his experience with sex crimes, he likely used the word because he knew it to be a *Dost* factor that courts consider. Or it may have been a relic from prior versions of his Affidavit; the reference to the two apparently teenage males in the photos as “young boys” suggests language recycled from other investigations involving actual young children. Whatever the case, the Court has all the information that it needs to find for Mr. Dunn on the *Franks* issue. Trooper Donovan’s description of the photos was objectively unreasonable, so there is no need for a hearing to assess his subjective thoughts, which are irrelevant. *See United States v. Hadfield*, 918 F.2d 987, 993 (1st Cir. 1990)(“To the extent that the claim suggests that a court called upon to review the adequacy of a search warrant application should focus on subjective rather than objective criteria, it is wrongheaded.”).

**C. The Court Should Order Suppression Of The Fruits Of The Search Of Mr. Dunn's House Because, Absent Trooper Donovan's Mischaracterizations In The Affidavit, There Was No Probable Cause.**

Finally, the Court must decide whether Donovan's false statement was necessary to a finding of probable cause to search Mr. Dunn's house. See *Andre*, 484 at 408. The Commonwealth has conceded as much. RA.067 ("The Commonwealth agrees that the description of those images is the basis for the probable cause to search the apartment and speak with the Defendant, and absent those images ... there would not be probable cause to search the house.").

**WHY DIRECT APPELLATE REVIEW IS APPROPRIATE**

When a magistrate finds probable cause to search property based on a law enforcement officer's summary description of purportedly lewd images, but the images are not really lewd, then constitutionally protected speech will have been used to search constitutionally protected private property. In one fell swoop, the right to free speech and the right to privacy will have been violated. The same is true when a lewd image is the basis for criminal charges and arrest. See note 3 above.

A simple way to reduce this risk is to require that a magistrate personally view the images whose lewdness would provide the



probable cause for the search or criminal complaint. This Court has repeatedly noted the independent duty of the judiciary to examine purportedly obscene images to ensure that protected speech is not abridged. *See* citations at page 13 above. There is no reason why a different rule should apply at the probable cause stage. To the contrary, once a case moves beyond the probable cause stage the constitutional damage has to some extent already been done, in terms of chilling speech and invading reasonable expectations of privacy.

This Court should follow the First Circuit and hold that it is generally error to issue a search warrant “absent an independent review of the images.” *Brunette*, 256 Mass. at 19. There may be rare cases where it is not feasible for the magistrate to view the images, and then a finding of probable cause must be based on a “reasonably specific description” of the images, *id.*, but the general rule should be that the magistrate must personally make the initial assessment of lewdness. As noted, the Court could ground its ruling in article 16, or the First Amendment, or both. Although the Appeals Court is a common law court capable of fashioning legal rules, this Court is in the best position to provide definitive constructions of state and

federal constitutional provisions, therefore direct appellate review is appropriate.

Respectfully submitted,

Warren Dunn,

By his counsel,

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Dated: MAY 2023

**CERTIFICATE OF COMPLIANCE**  
**PURSUANT TO MASS. R. A. P. 16(K)**

Pursuant to Mass. R.A.P. 13(d), I hereby certify that the foregoing application complies with the rules of court. In particular, the application is composed in 14 point proportionally spaced Times New Roman font and the Argument section is 1,980 words long.

/s/ Christopher DeMayo

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## **CERTIFICATE OF SERVICE**

Pursuant to Mass. R.A.P. 13(d), I hereby certify that on this date of May 11, 2023 I served the foregoing Application for Direct Appellate Review on the Commonwealth by sending copies via efileMA / e-mail to counsel of record, Carolynne Burbine, ADA.

/s/ Christopher DeMayo

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## **ADDENDUM**

Docket .....	RA.003
Indictments .....	RA.010
Commonwealth’s Motion For Court Order [To] Restrict Discovery Of Videotapes and Photographs .....	RA.014
Defendant’s Motion for <i>Franks</i> Hearing, Motion to Suppress Search Warrant, Memorandum of Law, and supporting papers .....	RA.017
Commonwealth’s Opposition to Motion For Franks Hearing and Motion to Suppress.....	RA.059
Memorandum of Decision and Order on Defendant’s Motion To Suppress Search Warrant And Motion For <i>Franks</i> Hearing.....	RA.069
Agreement to Plea Preserving Appellate Review .....	RA.080
Notice of Appeal .....	RA.082
Defendant’s Motion To Compel Commonwealth to Produce Two Photos Referenced in Search Warrant Application and margin order dated March 23, 2023 .....	RA.083

## 2183CR00085 Commonwealth vs. Dunn, Warren W

- Case Type:
- Indictment
- Case Status:
- Open
- File Date
- 03/12/2021
- DCM Track:
- B - Complex
- Initiating Action:
- CHILD PORNOGRAPHY, POSSESS c272 §29C
- Status Date:
- 04/01/2021
- Case Judge:
- 
- Next Event:
- 

[All Information](#) [Party](#) [Charge](#) [Event](#) [Tickler](#) [Docket](#) [Disposition](#)

### Party Information

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[Alias](#)

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[More Party Information](#)

### Party Charge Information

- Dunn, Warren W
- - Defendant

Charge # 1:  
**272/29C/A-1 - Felony** CHILD PORNOGRAPHY, POSSESS c272 §29C

- Original Charge
- 272/29C/A-1 CHILD PORNOGRAPHY, POSSESS c272 §29C (Felony)
- Indicted Charge
- 
- Amended Charge
- 

**Charge Disposition**

Disposition Date  
Disposition  
08/26/2022  
Guilty Plea

- **Dunn, Warren W**
- - Defendant

Charge # 2:  
**272/29C/B-1 - Felony** CHILD PORNOGRAPHY, POSSESS, 2ND OFF. c272 §29C

- Original Charge
- 272/29C/B-1 CHILD PORNOGRAPHY, POSSESS, 2ND OFF. c272 §29C (Felony)
- Indicted Charge
- 
- Amended Charge
- 

**Charge Disposition**

Disposition Date  
Disposition  
08/26/2022  
Guilty Plea

- **Dunn, Warren W**
- - Defendant

Charge # 3:  
**272/29C/A-1 - Felony** CHILD PORNOGRAPHY, POSSESS c272 §29C

- Original Charge
- 272/29C/A-1 CHILD PORNOGRAPHY, POSSESS c272 §29C (Felony)
- Indicted Charge
- 
- Amended Charge
- 

**Charge Disposition**

Disposition Date  
Disposition  
08/26/2022  
Guilty Plea

- **Dunn, Warren W**
- - Defendant

Charge # 4:  
**272/29C/B-1 - Felony** CHILD PORNOGRAPHY, POSSESS, 2ND OFF. c272 §29C

- Original Charge
- 272/29C/B-1 CHILD PORNOGRAPHY, POSSESS, 2ND OFF. c272 §29C (Felony)
- Indicted Charge
- 
- Amended Charge
- 

**Charge Disposition**

Disposition Date  
Disposition  
08/26/2022  
Guilty Plea

**Events**

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
04/01/2021 09:00 AM	Criminal 1 Brockton		Arraignment		Not Held
04/01/2021 09:00 AM	Criminal 2 Brockton		Arraignment		Held as Scheduled
06/08/2021 02:00 PM	Criminal 4 Plymouth		Pre-Trial Conference		Held as Scheduled

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
07/14/2021 02:00 PM	Criminal 4 Plymouth		Pre-Trial Conference		Held as Scheduled
08/19/2021 02:00 PM	Criminal 4 Plymouth		Lobby Conference		Held as Scheduled
10/18/2021 02:00 PM	Criminal 4 Plymouth		Non-Evidentiary Hearing on Suppression		Not Held
11/01/2021 12:00 PM	Criminal 4 Plymouth		Lobby Conference		Held via Video/Teleconference
12/15/2021 02:00 PM	Criminal 4 Plymouth		Conference to Review Status		Rescheduled
12/17/2021 02:00 PM	Criminal 4 Plymouth		Conference to Review Status		Rescheduled
12/29/2021 02:00 PM	Criminal 4 Plymouth		Conference to Review Status		Rescheduled
01/25/2022 02:00 PM	Criminal 4 Plymouth		Conference to Review Status		Held as Scheduled
03/01/2022 03:00 PM	Criminal 4 Plymouth		Lobby Conference		Held as Scheduled
04/15/2022 03:00 PM	Criminal 4 Plymouth		Lobby Conference		Held as Scheduled
06/09/2022 02:00 PM	Criminal 4 Plymouth		Lobby Conference		Rescheduled
06/27/2022 02:00 PM	Criminal 4 Plymouth		Lobby Conference		Held as Scheduled
08/26/2022 02:00 PM	Criminal 4 Plymouth		Hearing for Change of Plea		Held as scheduled
03/23/2023 02:00 PM	Criminal 4 Plymouth		Motion Hearing		Held as Scheduled

#### **Ticklers**

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Pre-Trial Hearing	04/01/2021	08/13/2021	134	08/26/2022
Final Pre-Trial Conference	04/02/2021	12/14/2021	256	08/26/2022
Case Disposition	04/01/2021	12/27/2021	270	08/26/2022

#### **Docket Information**

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
03/12/2021	Indictment(s) returned	1	<a href="#">Image</a>
03/29/2021	Attorney appearance On this date Amanda Fowle, Esq. added as Attorney for the Commonwealth for Prosecutor Plymouth County District Attorney		
03/29/2021	Attorney appearance On this date Sabrina Bonanno, Esq. added as Appointed - Indigent Defendant for Defendant Warren W Dunn		
03/29/2021	Event Result:: Arraignment scheduled on: 04/01/2021 09:00 AM Has been: Not Held For the following reason: Transferred to another session Patrick W Creedon, Presiding		
04/01/2021	Defendant arraigned before Court. Judge: Kelley, Hon. Angel		
04/01/2021	Appointment made for the purpose of Case in Chief by Judge Hon. Angel Kelley.		



<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
04/01/2021	Plea of not guilty entered on all charges. Judge: Kelley, Hon. Angel		
04/01/2021	Finding and Order on Bail: Judge: Kelley, Hon. Angel	2	<a href="#">Image</a>
04/01/2021	ORDER of Pre-Trial Conditions of Release Judge: Kelley, Hon. Angel	3	<a href="#">Image</a>
04/01/2021	Released on Personal Recognizance with the following conditions: Other Special Condition 1. No unsupervised contact with children under the age of 16 2. Defendant may have one electronic device used to access the internet with following exceptions: the Defendant may not have contact with any child under the age of sixteen(16) nor may the Defendant possess any encryption devices. a. Defendant may not use that electronic device for social media. i Social media includes but is not limited to: Facebook, tiktok, snapchat, Instragram, discord, Facebook messenger ii. Social media is not intended to prohibit access to text messages or email, provided he does not use those communication platforms to communicate directly with individuals under the age of 16		
04/01/2021	Bail warnings read Judge: Kelley, Hon. Angel		
04/01/2021	Not arraigned on sentencing enhancements Judge: Kelley, Hon. Angel		
04/01/2021	Case assigned to: DCM Track B - Complex was added on 04/02/2021	4	<a href="#">Image</a>
04/01/2021	Sent to Registry of Motor Vehicles, Department of Revenue and Department of Transitional Assistance:  Notice of Unpaid Legal Counsel Fees Sent On: 04/02/2021 09:44:47	5	
04/01/2021	Case continued to June 8,2021 at 2:00PM for pre-trial conference Fourth Criminal Session in Plymouth FTR		
04/02/2021	Case sent to Plymouth Superior - PLYMOUTH Location.		
06/08/2021	Case continued to July 14, 2021 at 2pm by agreement for further pre-trial conference and status of discovery ftr		
06/09/2021	Commonwealth 's Motion for court order restrict discovery of videotapes and photographs	6	<a href="#">Image</a>
07/14/2021	Sent to Registry of Motor Vehicles, Department of Revenue and Department of Transitional Assistance:  Notice of Paid Legal Counsel Fee Sent On: 07/14/2021 14:28:05	7	
07/14/2021	Pre-trial conference report filed	8	<a href="#">Image</a>
07/14/2021	Case continued to August 19, 2021 at 2pm by agreement for lobby conference ftr		
08/19/2021	Case continued by agreement to October 18, 2021 at 2:00 p.m. for hearing on non-evidentiary motion to suppress		
09/30/2021	Defendant 's EX PARTE Certificate for funds for Psychologist	9	
09/30/2021	Defendant 's Motion for Franks Hearing	10	<a href="#">Image</a>
09/30/2021	Defendant 's Motion to suppress search warrant	11	<a href="#">Image</a>
10/18/2021	Opposition to to defendant's motion for a franks hearing and motion to suppress filed by Plymouth County District Attorney	12	<a href="#">Image</a>
10/18/2021	Case continued by agreement until 11/1/21 at 12:00 pm for either Lobby or Non Evidentiary Hearing on Suppression. Hon. Elaine M Buckley, Presiding(FTR)		
11/01/2021	Defendant 's Motion for forensic image; filed and no action taken on the motion. Commonwealth to check with MSP regarding obtaining images; if there is an issue it will be addressed 12/15/21 at the status conference (Buckley,J)	13	<a href="#">Image</a>
11/01/2021	Defendant 's EX PARTE Motion for funds for forensic expert; filed and allowed u0p to amount sought (Buckley,J)	14	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
11/01/2021	After hearing Defendant 's Motion for Franks Hearing taken under advisement Case continued to December 15, 2021 at 2pm by agreement for status ftr		
11/26/2021	Event Result:: Conference to Review Status scheduled on: 12/15/2021 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Elaine M Buckley, Presiding		
12/17/2021	Event Result:: Conference to Review Status scheduled on: 12/17/2021 02:00 PM Has been: Rescheduled For the following reason: Other event activity needed Hon. Elaine M Buckley, Presiding		
12/28/2021	Event Result:: Conference to Review Status scheduled on: 12/29/2021 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Elaine M Buckley, Presiding		
01/04/2022	Endorsement on Defendant 's Motion for Franks Hearing, (#10.0): DENIED		<a href="#">Image</a>
01/04/2022	Endorsement on Defendant 's Motion to suppress search warrant, (#11.0): DENIED		<a href="#">Image</a>
01/04/2022	MEMORANDUM & ORDER:  on Defendant's motion to suppress search warrant and motion for franks hearing (Denied).  Judge: Buckley, Hon. Elaine M	15	<a href="#">Image</a>
01/25/2022	case continued to March 1, 2022 at 3pm by agreement for lobby conference ftr		
01/25/2022	Endorsement on Commonwealth's motion for court order to restrict discovery of videotapes and photographs, (#6.0): ALLOWED by agreement		
02/28/2022	Defendant 's EX PARTE Motion for funds for psychologist (Second)	16	
02/28/2022	Evaluation report from paul D. Zeizelm Psy.D filed	17	
03/01/2022	Plymouth County District Attorney's Memorandum in support of sentencing	18	<a href="#">Image</a>
03/01/2022	Endorsement on Motion for funds for psychologist (second), (#16.0): ALLOWED  Judge: Hallal, Hon. Mark A		
03/01/2022	Case continued to April 15, 2022 at 3pm by agreement for further lobby conference/trial assignment ftr		
04/15/2022	Case continued to June 9, 2022 at 2pm by agreement for further lobby conference and status Motion to be filed by May 27, 2022 FTR		
04/15/2022	Defendant files sentence recommendation	19	<a href="#">Image</a>
05/26/2022	Defendant 's Motion to suppress statements	20	<a href="#">Image</a>
06/08/2022	Event Result:: Lobby Conference scheduled on: 06/09/2022 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Brian A Davis, Presiding		
06/27/2022	Judge Davis retains jurisdiction Case continued to August 26, 2022 at 2pm by agreement for plea ftr		
08/01/2022	Commonwealth 's Supplemental Memorandum in Support of Sentencing	21	<a href="#">Image</a>
08/05/2022	Defendant 's Supplemental memorandum regarding sentencing	22	<a href="#">Image</a>
08/26/2022	Defendant waives rights.  Judge: Freniere, Hon Diane	23	<a href="#">Image</a>
08/26/2022	Plea colloquy given.		
08/26/2022	Defendant warned pursuant to alien status, G.L. c. 278, § 29D.		
08/26/2022	Defendant warned pursuant to the habitual offender statute G.L. c. 279, § 25(d)		

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>	<a href="#">Image Avail.</a>
08/26/2022	Defendant warned pursuant to the armed career criminal statute G.L. c. 269, § 10G		
08/26/2022	Notice given to defendant of duty to register as a sex offender.	23.1	<a href="#">Image</a>
08/26/2022	Defendant warned as to submission of DNA G.L. c. 22E, § 3		
08/26/2022	<p>Offense Disposition::</p> <p>Charge #1 CHILD PORNOGRAPHY, POSSESS c272 §29C  On: 08/26/2022 Judge: Hon. Brian A Davis  By: Hearing on Plea Offer/Change Guilty Plea</p> <p>Charge #2 CHILD PORNOGRAPHY, POSSESS, 2ND OFF. c272 §29C  On: 08/26/2022 Judge: Hon. Brian A Davis  By: Hearing on Plea Offer/Change Guilty Plea</p> <p>Charge #3 CHILD PORNOGRAPHY, POSSESS c272 §29C  On: 08/26/2022 Judge: Hon. Brian A Davis  By: Hearing on Plea Offer/Change Guilty Plea</p> <p>Charge #4 CHILD PORNOGRAPHY, POSSESS, 2ND OFF. c272 §29C  On: 08/26/2022 Judge: Hon. Brian A Davis  By: Hearing on Plea Offer/Change Guilty Plea</p>		
08/26/2022	<p>Defendant sentenced:: Sentence Date: 08/26/2022 Judge: Hon. Brian A Davis</p> <p>Charge #: 1 CHILD PORNOGRAPHY, POSSESS c272 §29C  State Prison Sentence Not Less Than: 5 Years, 0 Months, 0 Days Not More Than: 5 Years, 0 Months, 1 Days  Served Concurrently Charge # 2</p> <p>Charge #: 2 CHILD PORNOGRAPHY, POSSESS, 2ND OFF. c272 §29C  State Prison Sentence Not Less Than: 5 Years, 0 Months, 0 Days Not More Than: 5 Years, 0 Months, 1 Days</p> <p>Committed to Souza Baranowski Correctional Center</p> <p>Further Orders of the Court:</p> <p>Offense #001 &amp; 002 is a consolidated judgement. Defendant to be seen by medical upon arrival</p>		
08/26/2022	<p>Issued on this date:</p> <p>Mittimus for Sentence (All Charges)  Sent On: 08/26/2022 15:04:48</p>	24	<a href="#">Image</a>
08/26/2022	<p>Defendant sentenced:: Sentence Date: 08/26/2022 Judge: Hon. Brian A Davis</p> <p>Charge #: 3 CHILD PORNOGRAPHY, POSSESS c272 §29C  Charge #: 4 CHILD PORNOGRAPHY, POSSESS, 2ND OFF. c272 §29C</p> <p>Probation:  Risk/Need Probation Duration: 3 Years, 0 Months, 0 Days  To commence upon release from incarceration  Conditions: 1) register as a sex offender 2) no unsupervised contact with children under 16 years of age  3) stay of the internet</p>		
08/26/2022	<p>DNA fee WAIVED</p> <p>Judge: Davis, Hon. Brian A</p>		
08/26/2022	<p>Findings and Order of Statutory Fees</p> <p>Judge: Davis, Hon. Brian A</p>	25	<a href="#">Image</a>
08/26/2022	Defendant 's Motion to amend Commonwealth's motion for court order to restrict discovery of videotapes and photographs : filed and allowed by agreement (Davis,J)	26	<a href="#">Image</a>
08/26/2022	Defendant 's Notice of agreement to plea preserving appellate review; filed and allowed (Davis,J)	27	<a href="#">Image</a>
08/26/2022	<p>Event Result:: Hearing for Change of Plea scheduled on:  08/26/2022 02:00 PM  Has been: Held as scheduled  Hon. Brian A Davis, Presiding</p>		
08/29/2022	Case sent to Plymouth Superior - BROCKTON Location.		
09/09/2022	<p>Notice of appeal filed.  Re: Denial of Motion for a Franks Hearing and Motion to Suppress Search Warrant</p>	28	<a href="#">Image</a>

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Applies To: Dunn, Warren W (Defendant)		
09/09/2022	Notice to parties re: notice of appeal filed cc: AF, SB	29	
09/20/2022	Certification/Copy of Letter of transcript ordered from Court Reporter 11/01/2021 12:00 PM Lobby Conference, 08/26/2022 02:00 PM Hearing for Change of Plea	30	<a href="#">Image</a>
10/19/2022	CD of Transcript of 11/01/2021 12:00 PM Lobby Conference, 08/26/2022 02:00 PM Hearing for Change of Plea received from Linda Kelly.		
12/01/2022	Attorney appearance On this date Christopher DeMayo, Esq. added as Appointed - Appellate Action for Defendant Warren W Dunn	31	<a href="#">Image</a>
02/10/2023	Defendant 's Motion to compel Commonwealth to produce two photos referenced in search warrant application	32	<a href="#">Image</a>
02/13/2023	Case sent to Plymouth Superior - PLYMOUTH Location.		
03/23/2023	Event Result:: Motion Hearing scheduled on: 03/23/2023 02:00 PM Has been: Held as Scheduled  Comments: The phtos in question are impounded from view of anyone except those specifically authorized by the court. After hearing the court rules that Defense counsel is permitted to inspect but NOT copy the impounded photos upon filing a standard protective order. Hon. Brian A Davis, Presiding		
03/23/2023	Protective Order issued for defense counsel access to presumptively privileged records.  Judge: Davis, Hon. Brian A  Re. Cyber Tipline Report	33	<a href="#">Image</a>
03/23/2023	Endorsement on Motion to compel Commonwealth to produce two photos referenced in search warrant application, (#32.0): ALLOWED The photos shall be impounded for good cause shown. Counsel may view, but not copy, the impounded materials upon execution of an appropriate protective order  Judge: Davis, Hon. Brian A		<a href="#">Image</a>
03/23/2023	Other Records received from Commonwealth (from Cyber Tipline Report)		
<b>Case Disposition</b>			
<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>	
Disposed by Plea	08/26/2022		

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT DEPARTMENT  
INDICTMENT NO. 2183CR00085-001

COMMONWEALTH

VS.

WARREN W. DUNN

---

INDICTMENT  
PURCHASE OR POSSESSION OF VISUAL MATERIAL OF  
CHILD DEPICTED IN SEXUAL CONDUCT  
GENERAL LAWS CHAPTER 272, SECTION 29C(vii)  
(COUNT A)

---

At the SUPERIOR COURT, begun and holden at BROCKTON, within and  
for the COUNTY of PLYMOUTH, on MARCH 12, 2021,

THE JURORS for the Commonwealth of Massachusetts on their oath  
present that:

WARREN W. DUNN

of HULL in the COUNTY of PLYMOUTH, on or about JUNE 3, 2020, at HULL  
in the COUNTY of PLYMOUTH, did knowingly purchase or possess a  
negative, slide, book, magazine, film, videotape, photograph or other  
similar visual reproduction, or depiction by computer, of any child  
who the person knows or reasonably should know to be under the age of  
eighteen years and such child is depicted or portrayed in any pose,  
posture, or setting involving a lewd exhibition of the unclothed  
genitals, pubic area, buttocks or, if such person is female, a fully  
or partially developed breast of the child, with knowledge of the  
nature or content thereof.

SEE COUNT B

COUNT B

PURCHASE OR POSSESSION OF VISUAL MATERIAL OF  
CHILD DEPICTED IN SEXUAL CONDUCT  
SUBSEQUENT OFFENSE  
GENERAL LAWS CHAPTER 272, SECTION 29C(vii)

And the JURORS, aforesaid, for the Commonwealth of  
Massachusetts, on their Oath, aforesaid, do further present,  
That:

WARREN W. DUNN

of HULL in the COUNTY of PLYMOUTH, on or about JUNE 3, 2020, at HULL  
in the COUNTY of PLYMOUTH, the said WARREN W. DUNN, did knowingly  
purchase or possess a negative, slide, book, magazine, film,  
videotape, photograph or other similar visual reproduction, or  
depiction by computer, of any child who the person knows or reasonably  
should know to be under the age of eighteen years and such child is  
depicted or portrayed in any pose, posture, or setting involving a  
lewd exhibition of the unclothed genitals, pubic area, buttocks or, if  
such person is female, a fully or partially developed breast of the  
child, with knowledge of the nature or content thereof after having  
been previously convicted in

HINGHAM DISTRICT COURT; NO. 0758CR001475; OFFENSE: POSS. CHILD  
PORN; OFFENSE DATE: 6/24/2007; CONVICTION DATE: 11/29/2007

for violating GENERAL LAWS CHAPTER 272, SECTION 29C(vii)

A TRUE BILL

  
Foreman of the Grand Jury

  
Assistant District Attorney

RETURN

PLYMOUTH, SS. On this 12<sup>th</sup> day of March, 2021, this  
indictment was returned and presented to said Superior Court by the  
Grand Jury, and ordered to be filed and filed.

ATTEST:

1-2

  
Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT DEPARTMENT  
INDICTMENT NO. 2183CR00085-003

COMMONWEALTH

VS.

WARREN W. DUNN

---

INDICTMENT

PURCHASE OR POSSESSION OF VISUAL MATERIAL OF  
CHILD DEPICTED IN SEXUAL CONDUCT  
GENERAL LAWS CHAPTER 272, SECTION 29C(vii)  
(COUNT A)

---

At the SUPERIOR COURT, begun and holden at BROCKTON, within and  
for the COUNTY of PLYMOUTH, on MARCH 12, 2021, .

THE JURORS for the Commonwealth of Massachusetts on their oath  
present that:

WARREN W. DUNN

of HULL in the COUNTY of PLYMOUTH, on or about JUNE 3, 2020, at HULL  
in the COUNTY of PLYMOUTH, did knowingly purchase or possess a  
negative, slide, book, magazine, film, videotape, photograph or other  
similar visual reproduction, or depiction by computer, of any child  
who the person knows or reasonably should know to be under the age of  
eighteen years and such child is depicted or portrayed in any pose,  
posture, or setting involving a lewd exhibition of the unclothed  
genitals, pubic area, buttocks or, if such person is female, a fully  
or partially developed breast of the child, with knowledge of the  
nature or content thereof.

SEE COUNT B

COUNT B

PURCHASE OR POSSESSION OF VISUAL MATERIAL OF  
CHILD DEPICTED IN SEXUAL CONDUCT  
SUBSEQUENT OFFENSE  
GENERAL LAWS CHAPTER 272, SECTION 29C(vii)

And the JURORS, aforesaid, for the Commonwealth of  
Massachusetts, on their Oath, aforesaid, do further present,  
That:

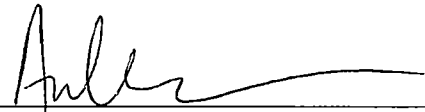
WARREN W. DUNN

of HULL in the COUNTY of PLYMOUTH, on or about JUNE 3, 2020, at HULL  
in the COUNTY of PLYMOUTH, the said WARREN W. DUNN, did knowingly  
purchase or possess a negative, slide, book, magazine, film,  
videotape, photograph or other similar visual reproduction, or  
depiction by computer, of any child who the person knows or reasonably  
should know to be under the age of eighteen years and such child is  
depicted or portrayed in any pose, posture, or setting involving a  
lewd exhibition of the unclothed genitals, pubic area, buttocks or, if  
such person is female, a fully or partially developed breast of the  
child, with knowledge of the nature or content thereof after having  
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HINGHAM DISTRICT COURT; NO. 0758CR001475; OFFENSE: POSS. CHILD  
PORN; OFFENSE DATE: 6/24/2007; CONVICTION DATE: 11/29/2007

for violating GENERAL LAWS CHAPTER 272, SECTION 29C(vii)

A TRUE BILL

  
Foreman of the Grand Jury

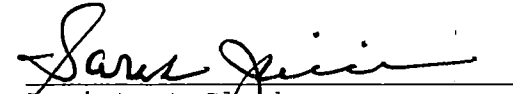
  
Assistant District Attorney

RETURN

PLYMOUTH, SS. On this 12<sup>th</sup> day of March, 2021, this  
indictment was returned and presented to said Superior Court by the  
Grand Jury, and ordered to be filed and filed.

ATTEST:

2-2

  
Assistant Clerk

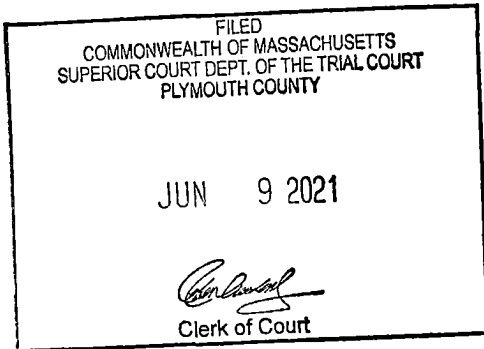


6-9-21 6

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

SUPERIOR COURT  
BROCKTON DIVISION  
NOS: 21-85



COMMONWEALTH

VS.

Warren Dunn

---

**COMMONWEALTH'S MOTION FOR COURT ORDER RESTRICT  
DISCOVERY OF VIDEOTAPES AND PHOTOGRAPHS**

---

The Commonwealth moves this Honorable Court to order that any discovery orders or agreements regarding any videotapes, photographs, documents, or printouts provided to counsel for the defendant by the Commonwealth be subject to the following conditions:

1. No discovery depicting the alleged victim, minor child, or any other Commonwealth witness, including any alleged child pornography, turned over to Defense Counsel by the Commonwealth shall be duplicated by any means without written consent from the court;
2. It is further ordered that any discovery depicting the alleged victims, minor children, or any other Commonwealth witnesses, including any alleged child pornography, turned over to Defense Counsel by the Commonwealth, are not to be copied, reproduced, disseminated, electronically stored and/or electronically uploaded to any computer and/or electronic storage device in any way, other than files created by the computer beyond control of the user.
3. All such discovery depicting the alleged victims, minor children, or any other Commonwealth witness, including any alleged child pornography, shall be kept in a secure place, such as a locked file cabinet accessible only to Defense Counsel, his defense expert and any authorized members of the defense team.

4. Any such discovery and any written transcript or any such documentation or photographs shall not any time and under any circumstances leave the care and custody of defense counsel of record for the defendant in the above criminal case;
  - a) Defense Counsel may seek to have any audio or video recording transcribed, provided that Defense Counsel and transcriptionist agree that the transcriptionist will abide by this protective order, and not make additional copies of any audio or video depicting the alleged victim, and will return any and all audio or video recordings, and send all transcripts to Defense Counsel immediately upon finishing the transcript.
  - b) Defense counsel may seek to have any discovery depicting the alleged victims, minor children, or any other Commonwealth witness, including any alleged child pornography, reviewed by a profession retained by Defense Counsel, provided Defense Counsel and such professional agree that the professional will abide by this protective order, and not make additional copies or retain any photographs or images and will return any and all discovery to Defense Counsel immediately upon completion of review.
5. If for any reason defense counsel withdraws from the case, the discovery, documents, printouts, photographs, videos, shall be returned to the Plymouth County District Attorney's Office within three (3) days of such withdrawal;
6. Neither the contents nor any written transcripts of the contents of any such videotape, or copies of any photographs shall be disclosed or displayed to any person except the defendant, legal assistant(s) or individual(s) hired specifically to assist in the preparation or trial of the above criminal; and
7. The contents of any such discovery, documents, printouts, photographs, videos, which are provided to counsel for the defendant during discovery, shall be returned to the Plymouth County District Attorney's Office within ten

(10) days of a change of plea, verdict, or resolution of appeal in the above criminal case.

8. It is agreed by the parties that the only way that the Commonwealth can provide Defense Counsel with ample opportunity to inspect, view and examine the images and data which are the subject of this case is by providing Defense Counsel with copies of the images and data under the terms set forth in this protective order.
9. The defense team is hereby protected from state, local, and federal prosecution, to the extent that the Commonwealth has the ability to issue such protections, while possessing the aforementioned materials, since the Commonwealth has alleged that the defendant's computer hard drive and software, including disks and/ or CDs contain contraband material, and the defense team would necessarily have to view and possess such contraband while they inspect and examine the aforementioned materials.
10. However, no member of the defense team is protected from prosecution for intentionally violating this Protective Order. An intentional violation of this Protective Order may result in sanctions and for prosecution of persons who possessed, received, copied and/or distributed contraband (that is, child pornography or obscene materials).

Respectfully submitted for the Commonwealth

TIMOTHY J. CRUZ  
District Attorney,

**Assented to By**

/s/ Sabrina Bonanno  
Fowle\_\_\_\_  
Counsel for the defendant

/s/ Amanda  
Assistant District Attorney

So ordered:

---

**LAW OFFICES  
OF  
SWEENEY & ASSOCIATES, L.L.C.**

---

RICHARD J. SWEENEY  
SABRINA E. BONANNO

---

PARALEGAL  
MAUREEN PLAYER

225 W. SQUANTUM STREET  
SUITE 100  
QUINCY, MA 02171  
(617) 328-6900  
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Email: mail@RSweeneylaw.com

September 30, 2021

Plymouth Superior Court  
52 Obery Street, Suite 2041  
Plymouth, MA 02360  
Attn: Criminal Clerk's Office

Re: Commonwealth v. Warren Dunn  
Docket 2183CR85

Dear Sir/Madam:

Enclosed herewith for filing please find Defendant's Motion for Franks Hearing, Defendant's Motion to Suppress Search Warrant, Memorandum of Law in Support of Motion for Franks Hearing and Motion to Suppress Search Warrant, Exhibit A: Search Warrant, Affidavit of Counsel, and Certificate of Service.

Please be advised this matter had been previously scheduled for a non-evidentiary Motion to Suppress hearing on Monday, October 18, 2021 at 2:00pm.

Very Truly Yours,

  
SABRINA BONANNO

Enc.  
cc: DA Office

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH,ss

SUPERIOR COURT  
DOCKET NO.: 2183CR85

COMMONWEALTH OF MASSACHUSETTS )  
 )  
v. )  
 )  
WARREN DUNN )

DEFENDANT'S MOTION FOR *FRANKS* HEARING

The defendant, in the above-entitled matter, respectfully moves, pursuant to Franks v. Delaware, 438 U.S. 154 (1978) and the Fourth and Fourteenth Amendment to the United States Constitution, that this Honorable Court hold a *Franks* hearing in this matter.

As grounds therefore, the defendant states search warrant number 2058SW019 was issued out of the Hingham District Court and executed at the defendant's residence on or about June 3, 2020. In the affidavit in support of the search warrant application, the affiant described two images in an attempt to establish probable cause that evidence related to the offenses of possession of child pornography and dissemination of child pornography would be found at the defendant's residence. For both images, the affiant stated "This image depicts a pubescent male standing completely naked with the *focus of the image* on the young boy's penis." (emphasis added). The defendant disputes that the focus of either image was on the male's penis. The affiant made a material misrepresentation of fact in the affidavit submitted to the Magistrate which was either a deliberate falsehood or made in reckless disregard for the truth which necessitates a *Franks* hearing. The defendant requests a *Franks* hearing so this Honorable Court may independently view the two images as they were not attached to the search warrant application.

The defendant relies on the attached Memorandum of Law, Affidavit of Counsel, and the two images which were the basis of the search warrant<sup>1</sup> in support of his Motion.

WHEREFORE, the defendant requests this Honorable Court hold a *Franks* hearing in this matter.

By His Attorney,



Sabrina Bonanno

Sweeney & Associates, LLC

225 W. Squantum Street, Suite 100

Quincy, MA 02171

(617) 328-6900

BBO #: 678802

sbonanno@rsweeneylaw.com

---

<sup>1</sup> Due to the sensitive nature of the images, counsel will submit the images under seal at the hearing.

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH,ss

SUPERIOR COURT  
DOCKET NO.: 2183CR85

COMMONWEALTH OF MASSACHUSETTS )  
 )  
v. )  
 )  
WARREN DUNN )

DEFENDANT'S MOTION TO SUPPRESS SEARCH WARRANT

The defendant, in the above-entitled matter, respectfully moves, pursuant to Mass. R. Crim. P. 13, that this Honorable Court suppress any and all evidence seized on June 3, 2020 from the defendant's residence located at 1187 Nantasket Ave, Apt. 2, Hull, Massachusetts after execution of Hingham District Court, search warrant number 2058SW019.

As reasons therefore, there was a deliberate and material misrepresentation of fact in the affidavit submitted to the Magistrate. Specifically, the affiant described two images as "This image depicts a pubescent male standing completely naked with the *focus of the image* on the young boy's penis." (emphasis added). The defendant disputes that the focus of either image was on the male's penis. The material misrepresentation was either a deliberate falsehood or made in reckless disregard for the truth on the part of the affiant. The defendant further alleges that the excision of the material misrepresentation of fact from the affidavit will render the affidavit insufficient as a matter of law to establish probable cause for the issuance of the search warrant in violation of the Fourth and Fourteenth Amendment to the United States Constitution.

The defendant has filed a Motion for *Franks* Hearing in this matter pursuant to Franks v. Delaware. 438 U.S. 154, 171 (1978).

If the Court sets aside the false statements, the remaining content of the affidavit is insufficient to establish probable cause and the search warrant must be voided and the fruits of

the search suppressed. Franks, 438 U.S. at 156; Wong Sun v. U.S., 371 U.S. 471 (1963). The defendant further moves that any and all statements made by him to the State Police must also be suppressed as “fruit of the poisonous tree”. *Id.*

As further grounds, the defendant states the affiant failed to attach the two images to the search warrant application and therefore the search warrant issued without probable cause in violation of the Fourth and Fourteenth Amendment to the United States Constitution. *See United States v. Brunette*, 256 F.3d 14, 17 (1st Cir. 2001) (stating “evidence on the nature of the images consisted solely of [the agent’s] legal conclusion parroting the statutory definition. . . . This bare legal assertion, absent any descriptive support and without an independent review of the images, was insufficient to sustain the magistrate judge’s determination of probable cause.”) The defendant moves that the evidence seized from his residence and the defendant’s statements be suppressed as “fruit of the poisonous tree”. Wong Sun, 371 U.S. 471.

The defendant relies on the attached Memorandum of Law, Affidavit of Counsel, and the two images which were the basis of the search warrant<sup>1</sup> in support of his Motion.

By His Attorney,



Sabrina Bonanno

Sweeney & Associates, LLC

225 W. Squantum Street, Suite 100

Quincy, MA 02171

(617) 328-6900

BBO #: 678802

sbonanno@rsweeneylaw.com

---

<sup>1</sup> Due to the sensitive nature of the images, counsel will submit the images under seal at the hearing.



COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH,ss

SUPERIOR COURT  
DOCKET NO.: 2183CR85

COMMONWEALTH OF MASSACHUSETTS )  
 )  
v. )  
 )  
WARREN DUNN )

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR *FRANKS* HEARING AND  
MOTION TO SUPPRESS SEARCH WARRANT

I. FACTS

The Application for Search Warrant to search 1187 Nantasket Ave, Apt. 2, Hull, Massachusetts was filed and issued on June 3, 2020. See Exhibit A. In support of the search warrant, the Affiant, Trooper Donovan, stated that the Massachusetts State Police Cyber Crime Unit/ Internet Crimes Against Children (ICAC) Task Force was assigned to investigate a CyberTipline Report from the National Center for Missing and Exploited Children (NCMEC). On April 27, 2020, Sergeant Dowling forwarded CyberTipline Report #66065219 dated March 18, 2020 from NCMEC which received the report from Microsoft. Microsoft reported that two files were uploaded. The affiant wrote that the two images were as follows:

FileName: 2c8d5e17-12c5-412e-b359-914a3e64868a.jpg

Description: This image depicts a pubescent male standing completely naked with the focus of the image on the young boy's penis. The young boy is approximately 13 to 15 years of age.

FileName: c41d561a-95c9-4939-ab60-6cd12b8b4a6a.jpg

Description: This image depicts a pubescent male standing completely naked with the focus of the image on the young boy's penis. The young boy is approximately 13 to 15 years of age

An administrative subpoena to Comcast for the Internet Protocol (IP) associated with the CyberTipline Report came back with the defendant as the subscriber name and his residence. Based on those two images, police obtained the search warrant. The Search Warrant was executed the same day it issued, June 3, 2020.

Trooper Donovan, Trooper Adair, Detective Reilly, and Detective O’Neil knocked on the defendant’s door, the defendant answered the door, and then the police entered the residence. The defendant was informed of the search warrant and allegedly made several inculpatory statements after being Mirandized. The defendant allegedly admitted to searching for images of underage boys on the internet and that investigators would find images of young boys naked and/or sexually posed. Police seized an Acer Chromebook, iPhone 8 Plus, one 32GB thumb drive, and an empty Tablet box. Images of child pornography were allegedly found on a 32GB thumb drive and only one image found on the iPhone 8 Plus was considered to be child pornography in violation of c. 272 §29C by Trooper Donovan.

## II. ISSUE

- (1) Whether the defendant is entitled to a *Franks* hearing?
  - A. Whether the affiant made materially false statements in the affidavit that the focal point of each image was the male’s penis?
  - B. If so, whether the false statements were material to a determination of probable cause?
  - C. Whether the evidence seized and statements made by the defendant must be suppressed?
- (2) Whether probable cause existed for the issuance of the search warrant? If not, whether the items seized and statements made should be excluded?

## III. ANALYSIS

“A search warrant may issue only on a showing of probable cause.” Commonwealth v. Kaupp, 453 Mass. 102, 110 (2009). “Under the Fourth Amendment and art. 14, probable cause requires a substantial basis, for concluding that the items sought are related to the criminal

activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues.” *Id.* (citing Commonwealth v. Cinelli, 389 Mass. 197, 213 cert. denied, 464 U.S. 860 (1983)). “In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Id.* at 110-11.

1. The defendant requests a *Franks* hearing in this matter.

“The general rule is that a motion to suppress evidence seized pursuant to a search warrant considers only the four corners of the search warrant application and supporting affidavit (and attachments).” J.A. Grasso & C.M. McEvoy, *Suppression Matters Under Massachusetts Law*, § 10-6[a], (2020) (citing Commonwealth v. O’Day, 440 Mass. 296 (2003)). “An exception to the four corners rule exists in the limited situation where the defendant challenges the truthfulness of the statements made by the affiant in the supporting affidavit. This exceptional situation prompts a *Franks* hearing.” *Id.* at §10-6[b] (citing Franks v. Delaware, 438 U.S. 154 (1978)). “In his motion and affidavit requesting a hearing, the defendant must first make a ‘substantial preliminary showing’ that the affiant either intentionally or recklessly made materially false statements in his affidavit.” *Id.* The United State Supreme Court noted in *Franks v. Delaware* stated that “[t]here is, of course, a presumption of validity with respect to the affidavit supporting the search warrant.” Franks, 438 U.S. at 171. The Court explained that “[t]o mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.” *Id.* The defendant “should point out specifically the portion

of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons.” *Id.* “Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.” *Id.*

“Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.” *Id.* at 171-72. “On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.” *Id.* at 172. “In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit’s false material set to one side, the affidavit’s remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.” *Id.* at 156.

In the Commonwealth, “[t]he defendant is entitled to a Franks hearing only if he makes two ‘substantial preliminary showing[s].’” Commonwealth v. Andre, 484 Mass. 403, 407 (2020) (citation omitted). “First, the defendant must demonstrate that the affiant included ‘a false statement knowingly and intentionally, or with reckless disregard for the truth’ or intentionally or recklessly omitted material in the search warrant affidavit.” *Id.* at 407-408 (citation omitted). “Second, the defendant must show that ‘the allegedly false statement is necessary to the finding of probable cause,’ or that the inclusion of the omitted information would have negated the magistrate’s probable cause finding ....” *Id.* at 408 (citation omitted).

“If a Franks hearing is ordered, the defendant must meet the same two-prong test by a preponderance of the evidence (as opposed to the ‘substantial preliminary showing’ already demonstrated). *Id.* (citation omitted). “If the judge finds probable cause lacking, the judge must void the warrant and suppress the evidence and any ‘fruits thereof.’” *Id.* “In Commonwealth v. Douzanis, 384 Mass. 434 (1981), we noted that, [a]lthough the defendants did not make a sufficient showing to require the holding of a *Franks*-type hearing as a matter of constitutional right, we have acknowledged the right of a trial judge, *in his discretion*, to hold a hearing merely on a showing that an affidavit contained misstatements of fact, particularly material misstatements.” Commonwealth v. Signorine, 404 Mass. 400, 406 (1989) (quoting Douzanis, 384 Mass. at 439) (internal quotations omitted) (emphasis added).

In this case, the defendant moves for a *Franks* hearing for the reasons set forth below.

A. The affiant made materially false statements that the focal point of each image was the male’s penis.

First, “the defendant must demonstrate that the affiant included ‘a false statement knowingly and intentionally, or with reckless disregard for the truth’ or intentionally or recklessly omitted material in the search warrant affidavit.” Andre, 484 at 407-408. “A statement is made in reckless disregard for the truth if the affiant had no reasonable grounds for believing the statement, or if he failed to take readily available steps to confirm or dispel whether the statement was true.” *Suppression Matters Under Massachusetts Law* at § 10-6[d][2][i]. The affiant described two images received from NCMEC in the search warrant affidavit. The affiant described the two images as follows:

FileName: 2c8d5e17-12c5-412e-b359-914a3e64868a.jpg

Description: This image depicts a pubescent male standing completely naked with the focus of the image on the young boy’s penis. The young boy is approximately 13 to 15 years of age.

FileName: c41d561a-95c9-4939-ab60-6cd12b8b4a6a.jpg

Description: This image depicts a pubescent male standing completely naked with the focus of the image on the young boy's penis. The young boy is approximately 13 to 15 years of age

The affiant noted that “the focus of the image [was] on the young boy's penis” in both descriptions. Independent review of these images, however, shows that the focus was not on the penis of either boy. Rather, these photographs were more akin to National Geographic type images or nudist beach images. The affiant recites his training and experience in the affidavit. It was therefore incumbent upon him to review the images and describe them accurately.

Importantly, just because there was a CyberTipline Report and a hash value associated with the two images does not mean the images are child pornography as defined by Massachusetts law. The affiant acknowledged as much when he testified before the Grand Jury that the information from NCMEC does not indicate whether the image is child pornography.<sup>1</sup> (GJ, pg. 4, ln. 18-24; pg. 5, ln. 1). The affiant also wrote in the search warrant affidavit that “NCMEC reported the two images were recognized hash values” and that “NCMEC has no additional information regarding these files, which may or may not contain apparent child pornography....” See Exhibit A. Further, the CyberTipline Report specifically states “Apparent Child Pornography (Unconfirmed) Files Not Reviewed by NCMEC.” Upon the receipt of the CyberTipline Report, the affiant was required to make an independent determination of whether the images were considered to be child pornography as defined by Massachusetts law. While the images do depict nudity, the focal point is not on the genitals.

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<sup>1</sup> Q Did that hash value indicate that the children or the images had not been identified but the images had been previously supplied to NCMEC for the child recognition and identification system?

A Yes.

Q Does that information indicate for certain whether or not it's child pornography?

A No.

Massachusetts General Laws c. 272 § 29C Possession of Child Pornography

provides:

Whoever knowingly purchases or possesses a negative, slide, book, magazine, film, videotape, photograph or other similar visual reproduction, or depiction by computer, of any child whom the person knows or reasonably should know to be under the age of 18 years of age and such child is:

- i. actually or by simulation engaged in any act of sexual intercourse with any person or animal;
- ii. actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus or sex organs of the child and the sex organs of another person or animal;
- iii. actually or by simulation engaged in any act of masturbation;
- iv. actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal;
- v. actually or by simulation engaged in any act of excretion or urination within a sexual context;
- vi. actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or
- vii. depicted or portrayed in any pose, posture or setting involving a *lewd exhibition* of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child; with knowledge of the nature or content thereof shall be punished .... (emphasis added).

In this case, image 2c8d5e17-12c5-412e-b359-914a3e64868a.jpg depicts a standing nude male from the knees up, looking to the right, with trees in the background. Image c41d561a-95c9-4939-ab60-6cd12b8b4a6a.jpg depicts a nude male holding a rock with trees in the background. M.G.L. c. 272 §29C(i)-(vi) are therefore not applicable in this case. In neither image is either male “engaged in any act of sexual intercourse with any person or animal.” *See* M.G.L. c. 272 §29C(i). In neither image is either male “engaged in any sexual contact involving the sex organs of the child and the mouth, anus or sex organs of the child and the sex organs of another person or animal. *See* M.G.L. c. 272 §29C(ii). In neither image is either male “engaged in an act



of masturbation.” *See* M.G.L. c. 272 §29C(iii). In neither image is either male “portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal.” *See* M.G.L. c. 272 §29C(iv). In neither image is either male “engaged in any act of excretion or urination within a sexual context.” *See* M.G.L. c. 272 §29C(v). In neither image is either male “portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context. *See* M.G.L. c. 272 §29C(vi).

The only question is whether either male is “depicted or portrayed in any pose, posture or setting involving a *lewd exhibition* of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child....” *See* M.G.L. c. 272 §29C(vii) (emphasis added). In this case, neither male is depicted or portrayed in a pose, posture or setting involving a lewd exhibition. While the two males are naked in their respective images, that is insufficient by itself to render an image lewd. Commonwealth v. Rex, 469 Mass. 36, 40, 48 (2014) (The “depiction of mere nudity is insufficient to render a visual image lewd.”)

“Lewd exhibition” is not defined in General Laws c. 272, § 29C. *Id.* at 43. It is, however, “well settled that nudity alone is not enough to render a photograph lewd.” *Id.* at 44 (citations and quotations omitted). “In deciding whether a particular exhibition of a child's naked body is lewd, courts have looked to the criteria articulated in *United States v. Dost*, 636 F.Supp. 828, 832 (S.D.Cal.1986), *aff'd sub nom.*” *Id.* (citations omitted). “The *Dost* factors are as follows:

1. whether the focal point of the visual depiction is on the child's genitalia or pubic area;
2. whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
3. whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
4. whether the child is fully or partially clothed, or nude;



5. whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; [and]
6. whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

*Id.* at 44-45 (*quoting United States v. Dost*, 636 F.Supp. at 832).

In *Rex*, the SJC described seven photographs that made up Grand Jury Exhibits 7-13. *Id.* at 46. In Grand Jury Exhibit 7, a man and four prepubescent children are standing on rock near water. *Id.* They are smiling but otherwise nude. *Id.* The genitals of two boys are visible. *Id.* Grand Jury Exhibit 8 depicts a nude prepubescent child from the rear but the genitals are not visible. *Id.* Grand Jury Exhibit 9 depicts a nude prepubescent boy as seen from the side. *Id.* “His genitals are visible, albeit not clearly.” *Id.* Grand Jury Exhibit 10 depicts two nude prepubescent boys with their genitals visible. *Id.* at 46-47. One child is shown pouring water over the head of the second child from a hose. *Id.* Grand Jury Exhibit 11 depicts two nude prepubescent children, a boy and a girl, standing side by side with their genitals visible. *Id.* at 47. “The girl appears to have her arm around the boy's waist, she is resting her head on his shoulder, and she is smiling.” *Id.* Grand Jury Exhibit 12 depicts “a prepubescent child, as seen from the rear, standing at the edge of a body of water. The child is nude. No genitals are visible.” *Id.* Grand Jury Exhibit 13 depicts “a prepubescent boy, bending over a bicycle and appearing to adjust its seat.” *Id.* The boy is nude and his genitals are visible, but not clearly. *Id.*

According to the Supreme Judicial Court, it was “plainly apparent that the [photographs] only notable feature is the nudity of the children.” *Id.* “In none of the photocopies is the focal point of the visual depiction a child's genitals, and the children are not shown in any unnatural poses.” *Id.* “Rather, the children are portrayed either simply standing around or engaging in ordinary activities in unremarkable settings. The visibility of the children's genitals is merely an inherent aspect of the fact that they are naked.” *Id.* “There is nothing remotely sexual, either

explicitly or implicitly, in any of the photocopies. The demeanor, facial expressions, and body language of the children suggest nothing inappropriate.” *Id.* “In the photocopies depicting more than one child, the children appear to be comfortable in their surroundings and enjoying each other’s company in a nonsexual manner.” *Id.* “Nothing about the photocopies indicates in any way that they were derived from the sexual exploitation of the children depicted therein, such that their possession would result in the continuing victimization of those children.” *Id.* at 47-48.

“As we have said, the depiction of mere nudity is insufficient to render a visual image lewd.” *Id.* at 48. The Supreme Judicial Court concluded that as “a matter of law, no grand jury could conclude that the seven photocopies constituted a “lewd exhibition” under G.L. c. 272, § 29C (vii). Similarly, review of the two images in this case indicates the focal point of the images were not the males’ genitals. Rather, they were two photographs of two boys in nature who just happened to be nude. There was nothing remotely sexual about the images, either implicitly or explicitly. Nor does the demeanor, facial expressions, or body language of either male indicate anything sexual. The images merely depicted two nude males standing against a backdrop of trees.

Importantly, it does not matter that the affidavit contained information that the defendant was a level 2 sex offender and that a Hull Police Department report from 2007 stated that “there were various media forms containing child pornography of boys as young as 10 years old” and that the defendant had made several admissions at that time related to the investigation. *See id.* at 44 (quoting United States v. Villard, 700 F.Supp. 803, 812 (D.N.J.1988) (“When a picture does not constitute child pornography, even though it portrays nudity, it does not become child pornography because it is placed in the hands of a pedophile”). If the two images at issue in this case were in a family photo album, they would not be considered child pornography. As such,

just because the images were allegedly uploaded by the defendant does not suddenly change the character of the images from non-child pornography to child pornography. See Villard, 700 F.Supp. at 812.

The affiant's statement that the focus of each image was on the male's penis was at best made in reckless disregard for the truth and at worst a deliberate falsehood. The affiant had a duty to view the images in the context of Massachusetts law, and not just rely on a NCMEC tip that had not been viewed before being forwarded to Massachusetts law enforcement to investigate.

B. The false statements were material to a determination of probable cause.

Second, the defendant must show that "the allegedly false statement is necessary to the finding of probable cause." Andre, 484 at 408. In this case, the affiant's false statements were material to a determination of probable cause. Specifically, the affiant stated that the "focus of the image [was] on the young boy's penis". This was the only information contained within the affidavit indicating the images were consistent with child pornography. Without the description of the focal point being the male's penis, there was no other information indicating evidence of child pornography would be found at the defendant's residence. Since the description of the two images was the only evidence indicating child pornography may be found in the defendant's residence, it was material to the determination of probable cause.

C. The evidence seized and the statements made by the defendant must be suppressed because probable cause for the issuance of the search warrant no longer exists once the affiant's description of the images is removed.

The affiant's statement that the focal point of each image was the male's penis was material to the probable cause determination. Once that statement is excised, probable cause no longer existed for the issuance of the search warrant. "If the judge finds probable cause lacking,

the judge must void the warrant and suppress the evidence and any ‘fruits thereof.’” Andre, 484 Mass. at 408. The defendant therefore moves that all evidence seized pursuant to the search warrant including but not limited to Acer Chromebook, iPhone 8 Plus, one 32GB thumb drive, and an empty Tablet box be suppressed as probable cause no longer existed for the issuance of the search warrant. Furthermore, the defendant’s statements were made as a direct result of the execution of the search warrant as the interrogation of the defendant took place while the search warrant was being executed. The defendant’s statements must therefore be suppressed as well. Andre, 484 Mass. at 408; Wong Sun v. United States, 371 U.S. 471 (1963). Based on the foregoing, the defendant respectfully requests a *Franks* hearing, and after the conclusion of the hearing, requests that the evidence seized from his residence and his statements to police be suppressed.

2. The affiant did not provide copies of the images or an accurate description of the images to permit the magistrate to determine whether the images constituted child pornography.

Since the affiant failed to provide an accurate description of the photographs and the Magistrate did not view the images independently of the affiant’s description, the Magistrate did not hear probable cause to issue the search warrant. “A search warrant may issue only on a showing of probable cause.” Commonwealth v. Kaupp, 453 Mass. 102, 110 (2009). “Under the Fourth Amendment and art. 14, probable cause requires a substantial basis, for concluding that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues.” *Id.* (citing Commonwealth v. Cinelli, 389 Mass. 197, 213 cert. denied, 464 U.S. 860 (1983)). “In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are

not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Id.* at 110-11. “While an application for a search warrant need not make a showing beyond a reasonable doubt, ‘[s]trong reason to suspect is not adequate.’” *Id.* at 111. “In reviewing a finding of probable cause, the affidavit should be interpreted in a commonsense and realistic fashion....” *Id.*

Under the Fourth Amendment, the Magistrate should have reviewed the images independent of the affiant’s bare bones description of the images. The “evidence on the nature of the images consisted solely of [the agent’s] legal conclusion parroting the statutory definition. . . . This bare legal assertion, absent any descriptive support and without an independent review of the images, was insufficient to sustain the magistrate judge’s determination of probable cause.”<sup>2</sup> United States v. Brunette, 256 F.3d 14, 17 (1st Cir. 2001). The question is always “the same: does a given image fall within the statutory definition of child pornography? Only if there is probable cause to believe so may a search warrant issue. A judge cannot ordinarily make this determination without either a look at the allegedly pornographic images, or at least an assessment based on a detailed, factual description of them.” *Id.* “The district court excused the absence of descriptive evidence by relying on [the agent’s] representation that the images were pornographic, finding that his training and experience qualified him to determine they met the statutory definition. But probable cause to issue a warrant must be assessed by a judicial officer, not an investigating agent.” *Id.* at 18. “This judicial determination is particularly important in

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<sup>2</sup> The court in *Brunette* did not suppress the wrongfully seized evidence because it found the good faith exception to the warrant requirement applied. Brunette, 256 F.3d at 19. Massachusetts, however, does not recognize the good faith exception to the warrant requirement. Commonwealth v. Fredericq, 482 Mass. 70, 84 (2019) (“We do not recognize a ‘good faith’ exception to either the exclusionary rule or the attenuation doctrine.”)

child pornography cases, where the existence of criminal conduct often depends solely on the nature of the pictures.” *Id.*

In this case, the affiant describes the two images separately but with the same description: the male is “naked with the focus of the image on the young boy’s penis.” These images were not attached to the search warrant application. The failure to allow the magistrate or judge to make an independent determination whether the images constitute child pornography is fatal especially since the description provided was devoid of detail and inaccurate. *See generally Brunette*, 256 F.3d 14. There is a reason the best practice is to attach the images to the search warrant application and this case is the perfect example of why the magistrate should have independently reviewed the images. The images were in the nature of National Geographic or nudist beach images which would have been apparent to the magistrate upon inspection. The affidavit did not contain sufficient information on which the issuing magistrate could independently conclude that the images constituted child pornography. As such, the affidavit was insufficient to establish probable cause to support the issuance of a search warrant.

The general rule is that evidence is to be excluded if it is found to be the ‘fruit’ of a police officer’s unlawful actions. *Wong Sun v. United States*, 371 U.S. 471 (1963). The ‘fruit of the poisonous tree’ doctrine which forbids putting illegally seized evidence to any use applies to verbal statements as well as to tangible evidence. *Commonwealth v. Conway*, 2 Mass. App. Ct. 547, 553 (1974) (citing *Wong Sun*, 371 at 485). The United States Supreme Court stated:

[N]ot ... all evidence “is fruit of the poisonous tree” simply because it would not have to come to light but for the illegal actions of the police. Rather, the more apt question ... is “whether granting establishment of the primary illegality the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”

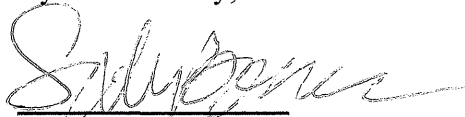
*Wong Sun*, 371 U.S. at 488 (citations omitted).

In this case, the evidence seized from the defendant's residence should be suppressed because the search warrant issued without probable cause. Franks, 438 U.S. at 156; Andre, 484 Mass. at 408; Wong Sun, 371 U.S. 471. Further, the defendant's statements were made as a direct result of the police executing the search warrant and must also be suppressed as fruit of the poisonous tree. *Id.*

#### CONCLUSION

The defendant respectfully requests that all evidence seized as result of the execution of the search warrant and any statements made by the defendant be suppressed.

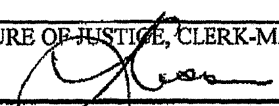
By His Attorney,

A handwritten signature in black ink, appearing to read 'Sabrina Bonanno', written over a horizontal line.

Sabrina Bonanno  
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# EXHIBIT A



<b>SEARCH WARRANT</b>		TRIAL COURT OF MASSACHUSETTS	
G.L.c. 276, §§ 1-7		<u>District</u>	COURT DEPARTMENT
NAME OF APPLICANT		<u>HINGHAM</u>	DIVISION
Trooper Gerald F. Donovan, #3424			
POSITION OF APPLICANT		SEARCH WARRANT DOCKET NUMBER	
MA State Police Detective		2058SW019	
<p><b>TO THE SHERIFFS OF OUR SEVERAL COUNTIES OR THEIR DEPUTIES, ANY STATE POLICE OFFICER, OR ANY CONSTABLE OR POLICE OFFICER OF ANY CITY OR TOWN, WITHIN OUR COMMONWEALTH:</b></p> <p>Proof by affidavit, which is hereby incorporated by reference, has been made this day and I find that there is <b>PROBABLE CAUSE</b> to believe that the property described below</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> has been stolen, embezzled, or obtained by false pretenses</li> <li><input checked="" type="checkbox"/> is intended for use or has been used as a means of committing a crime.</li> <li><input type="checkbox"/> has been concealed to prevent a crime from being discovered.</li> <li><input checked="" type="checkbox"/> is unlawfully possessed or concealed for an unlawful purpose.</li> <li><input checked="" type="checkbox"/> is evidence of a crime or is evidence of criminal activity.</li> <li><input type="checkbox"/> other (specify)</li> </ul> <p><b>YOU ARE THEREFORE COMMANDED</b> within a reasonable time and in no event later than seven days from the issuance of this search warrant to search for the following property:</p> <p>Any physical evidence, as well as any computer / cellular smart phone data files contained within the computers, cell phones, digital devices, and related digital media listed in more particularity in "Attachment 1" searching for child pornography as defined by Massachusetts General Laws, Chapter 272, Section 29C, which is illegal to possess and disseminate.</p> <p><input checked="" type="checkbox"/> at : <b>1187 Nantasket Ave, Hull Apt 2 - See "Attachment 2"</b></p> <p>which is occupied by and/or in the possession of: <b>Warren Dunn (DOB: 5/27/1953)</b></p> <p><input checked="" type="checkbox"/> on the person or in the possession of :</p> <p>You <input type="checkbox"/> are <input checked="" type="checkbox"/> are not also authorized to conduct the search at any time during the night.</p> <p>You <input type="checkbox"/> are <input checked="" type="checkbox"/> are not also authorized to enter the premises without announcement.</p> <p>You <input checked="" type="checkbox"/> are <input type="checkbox"/> are not also commanded to search any person present who may be found to have such property in his or her possession or under his or her control or to whom such property may have been delivered.</p> <p><b>YOU ARE FURTHER COMMANDED</b> if you find such property or any part thereof, to bring it, and when appropriate, the persons in whose possession it is found before the <b>HINGHAM</b> Division of the <u>District</u> Court Department.</p>			
DATE ISSUED		SIGNATURE OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK	
6/3/20		<input checked="" type="checkbox"/> 	
FIRST OR ADMINISTRATIVE JUSTICE		PRINTED NAME OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK	
WITNESS: <b>Bedley, J.</b>		<b>Lucy Canavan</b>	

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

HINGHAM DISTRICT COURT

TRIAL COURT

DOCKET #: 2058SW019

APPLICATION & AFFIDAVIT OF TROOPER GERALD F. DONOVAN, #3424  
MASSACHUSETTS STATE POLICE  
IN SUPPORT OF A SEARCH WARRANT

I, Trooper Gerald F. Donovan, #3424, being duly sworn, hereby depose and say that:

1. CLASSIFICATION OF SEARCH.

Based upon the information contained or referenced herein, there is PROBABLE CAUSE to believe that the items described below:

- a. ☐ has been stolen, embezzled, or obtained by false pretenses.
- b. ☒ is intended for use or has been used as the means of committing a crime.
- c. ☐ has been concealed to prevent a crime from being discovered.
- d. ☒ is unlawfully possessed or concealed for an unlawful purpose.
- e. ☒ is or contains evidence of a crime or is evidence of criminal activity.
- f. ☐ as otherwise specified:

2. DESCRIPTION OF THE PLACE TO BE SEARCHED.

Based upon the information contained or referenced herein, there is probable cause to believe that the items described below may be found at the residence/property of/occupied by **Warren Dunn (DOB: 5/27/1953) located at 1187 Nantasket Ave, Apt 2, Hull, MA.** From the road, the building is more particularly described as a string of connected apartment buildings. Building 1187 has a glass front door with the numerals '1187' on the glass door.

3. DESCRIPTION OF ITEMS TO BE SEARCHED FOR AND SEIZED.

**I respectfully request the authority of the court to search for and to seize, if they be found, the following items from the premises described in Section 2 of this affidavit:**

- a. Desktop or laptop computer systems and all peripheral input and output devices.
- b. Media capable of receiving, transmitting, sending, or storing digital or electronic data, information, or files.
- c. Handheld electronic or digital devices capable of receiving, transmitting, sending, or storing digital or electronic data, information, or files including, but not limited to, MP3 players, digital cameras, portable tablet computing devices, personal digital assistants, and cellular phones.
- d. Computer system, hardware, or software applications, operating systems and documentation.
- e. Printed or written data, information, or files related to digital or electronic devices subject to seizure or otherwise indicative or related to computer accounts, Internet accounts, including printed files, information, bills, notes or similar items containing information relative to the use of the computer, user names, accounts, and passwords.

Affidavit of Trooper Gerald F. Donovan, #3424

Page 1 of 13

- f. Physical evidence, records, papers, or documents that indicate who is in control, custody, use, or possession of the premises designated for search.
- g. Any documents pertaining to the possession, receipt, origin, or distribution of images involving the sexual exploitation of children.
- h. Correspondence or other documents exhibiting an interest in the exploitation of children, as well as any material related to children that serves a sexual purpose for a given individual. Examples of such material includes child erotica, ordinary pictures or magazines of kids, fantasy stories, adolescent / child psychology books, sexual aids, kids' books, kids' videos, kids' clothing, kids' catalogues, etc.
- i. Visually explicit images/videos, whether on paper or its equivalent, which includes but not limited to negatives, slides, books, magazines, videotapes, photographs or other similar visual reproduction, or depiction by computer (specifically including such images/videos as stored within computer storage devices as computer data files) depicting any child known or reasonably believed to be under the age of 18 years of age, in which the child is:
- Actually or by simulation engaged in any act of sexual intercourse with any person or animal;
  - Actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus or sex organs of the child and the sex organs of another person or animal;
  - Actually or by simulation engaged in any act of masturbation;
  - Actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, caressing involving another person or animal;
  - Actually or by simulation engaged in any act of excretion or urination within a sexual context;
  - Actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadoomasochistic abuse in any sexual context; or
  - Depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child.
- j. Authorizing officers to copy digital evidence stored on a server (or servers) in another location if a server can be remotely accessed from a computer (or computers), a tablet (or tablets), and/or a cell phone (or cell phones) located at the site authorized to be searched by this warrant. This authorization would permit law enforcement to preserve the integrity of such evidence and prevent it from being tampered with or destroyed.
- k. Authorizing officers to impound and secure the premises and to keep out all unauthorized persons not assigned to the investigation during the time of search.
- l. Authorizing officers to photograph any of the aforementioned areas designated for search, including locations where the computer systems were located or securely stored if that procedure is necessary for the purpose of this investigation.
- m. Authorizing officers to allow a computer forensics expert, if available, to assist in the execution of the search of the computer system in furtherance of the warrant.
- n. Authorizing officers to search any person present in the areas designated for search, and to seize and search any and all digital devices or digital media capable of receiving, transmitting, sending, or storing digital or electronic data, information, or files, if found in possession or under the control of any person. Examples of such devices are thumb drives, micro SD cards, cellular phones / smart phones (i.e. iPhone, Samsung Galaxy, etc.), and iPods or digital devices which are capable of accessing the Internet.

Affidavit of Trooper Gerald F. Donovan, #3424

Page 2 of 13



**Authorizing officers to secure any of the aforementioned computer related items/digital evidence and transport them to an off-site secure location, to continue the search of the computer items and computer storage devices for the following items, and to seize, if they be found:**

- o. Any computer data files or cellular/smart phone data files, data, or other similar visual reproduction containing any sexually explicit visual images/videos or depiction by computer, of any child whom the person knows or reasonably should know to be under the age of 18 years of age and such child is:
- Actually or by simulation engaged in any act of sexual intercourse with any person or animal;
  - Actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus or sex organs of the child and the sex organs of another person or animal;
  - Actually or by simulation engaged in any act of masturbation;
  - Actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, caressing involving another person or animal;
  - Actually or by simulation engaged in any act of excretion or urination within a sexual context;
  - Actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or
  - Depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child.
- p. Computer or cellular/smart phone data files, records, logs associated with any of the above described files which may identify, trace, or record the facts, including but not limited to the date, time, modification, alteration, transmission or receipt via the Internet or other networks of any of the computer files described above, including, but not limited to file menus, Internet browser history, cache directories, registry entries, logs, and files.
- q. Computer or cellular/smart phone data files in the form of email, instant messaging, chat logs, or other communication logs, the contents of which involves the attempt to find, pose or exhibit a child in state of nudity or sexual conduct, possess, acquire, store, or distribute child pornography.
- r. Internet searches, stored within a computer data file or cellular/smart phone data file, using Internet search engines or file sharing programs for child pornography.
- s. Computer files or cellular/smart phone files and/or data that assist in identifying use, custody, control, or ownership of the computer systems and the removable storage devices.
- t. Computer files or cellular/smart phone files and/or data that contain passwords, access codes, usernames, or other identifiers necessary to examine or access items, software, or information seized.
- u. Computer data files or cellular/smart phone files and/or data containing the following terms:
- |                             |  |
|-----------------------------|--|
| <b>Peer-to-Peer Client:</b> | <b>Microsoft OneDrive</b>  |
| <b>IP Address:</b>          | <b>24.34.25.108</b>  |
| <b>Filename(s):</b>         | <b>2c8d5e17-12c5-412e-b359-914a3e64868a.jpg</b><br><b>c41d561a-95c9-4939-ab60-6cd12b8b4a6a.jpg</b> |

4. STATEMENT OF FACTS CONSTITUTING PROBABLE CAUSE.

- a. I, Gerald Donovan, am a Massachusetts State Police Trooper and have been so since my graduation from the State Police Academy in New Braintree, Massachusetts in 2006. Prior to my employment with the Massachusetts State Police I was employed as a Municipal Police Officer for the town of Falmouth, Massachusetts from April 2002 until attending the State Police Academy. During my career as a Falmouth Police Officer and Massachusetts State Police Trooper I have received training in criminal investigations and was assigned to the Bourne barracks and South Yarmouth barracks. On September 2013 I was assigned as a detective to the Massachusetts State Police Division of Investigative Services as a member of the Cape and Islands District State Police Detective Unit. This detective unit works in direct contact with the Cape and Islands District Attorney's Office. While assigned to the detective unit I received additional training and experience investigating homicides, suicides, suspicious deaths, unexpected or unattended deaths, as well as major crimes involving computers, cell phones, digital media, and the Internet. Moreover, while assigned to the detective unit I was assigned as an Internet Crimes Against Children (ICAC) Task Force member representing the Cape and Islands District, investigating crimes involving the sexual exploitation of children on the internet. In the course of my official duties as a Massachusetts State Police Trooper, I have interviewed many defendants, suspects and witnesses. Furthermore, I have made in excess of one hundred (100) arrests for a variety of criminal offenses. I have attended the ICAC Investigative Techniques Training Program, which includes crimes associated with child exploitation and I have attended the Massachusetts's Attorney General's Cyber Crime Conference yearly since 2014, which includes investigating crimes via social media. In August of 2018, I was transferred to the Massachusetts State Police Cyber Crime Unit and remained a member of the Massachusetts ICAC Task Force, with the responsibility of investigating major crimes statewide within the Commonwealth of Massachusetts. The Cyber Crime Unit is responsible for performing criminal investigations where computers or technology are the instruments used to affect the crime. Moreover, the duties include investigating various crimes involving threats, intrusions, conspiracies, unauthorized access, fraud, terrorism, and larceny cases as well as assisting various other units and agencies with homicides, sexual assaults, and drug trafficking cases. The primary duty assigned to the ICAC Task Force is performing criminal investigations involving the sexual exploitation of children on the internet.
- b. During the course of this investigation, information has been supplied by the National Center for Missing and Exploited Children® (NCMEC). NCMEC was established in 1984 as a private, nonprofit 501(c)(3) organization. NCMEC provides services nationwide for families and professionals in the prevention of abducted, endangered, and sexually exploited children. I am also aware from my experience working on child sexual exploitation investigations that NCMEC launched the CyberTipline on March 9, 1998, to serve as the national clearinghouse for tips and leads about child sexual exploitation. The CyberTipline ([www.missingkids.org/cybertipline](http://www.missingkids.org/cybertipline)) was developed to further NCMEC's mission of helping prevent and diminish the sexual exploitation of children by allowing the public and electronic service providers ("ESP's") to report online (and via toll-free phone) the enticement of children for sexual acts, extra-familiar child sexual molestation, child pornography, child sex tourism, child sex trafficking, unsolicited obscene materials sent to a child, misleading domain names, misleading words, or digital images on the Internet. A secure CyberTipline was created in February 2000 to facilitate the reporting of apparent child pornography by ESP's. Once registered with NCMEC, ESP's can upload files relating to child sexual exploitation content when making reports to NCMEC using a secure electronic connection. Uploaded image files may include images, video or other reported content. Neither the government nor any law

Affidavit of Trooper Gerald F. Donovan, #3424

Page 4 of 13



enforcement agency created the CyberTipline or has input into CyberTipline operations. The government does not instigate, direct, or provide guidance to NCMEC in its processing of CyberTipline reports. NCMEC staff cannot alter or change information submitted by a reporting ESP. NCMEC does not direct or mandate the type of information that an ESP may choose to submit in a CyberTipline report, but instead provides voluntary reporting fields that ESP's may populate with information, including uploading apparent child pornography image files. After an ESP makes a CyberTipline report to NCMEC, a staff member uses conventional and publicly-available open source tools to try to identify potential geographic information pertaining to the individual who is the subject of the report as well as geographic information of the ESP potentially used in connection with the reported image files. NCMEC is required only to make CyberTipline reports available to law enforcement. NCMEC is not required to open reported image files or review any content provided by a member of the public or an ESP in a CyberTipline report. If NCMEC independently decides to open a reported image file or review the contents of a CyberTipline report, it does so pursuant to its internal organizational and operational guidelines and in furtherance of its private mission to aid children. NCMEC does not open or view every image file submitted in a CyberTipline report. Pursuant to NCMEC's current review process, NCMEC staff make an independent determination whether to open reported image files based on operational factors, including but not limited to the volume of reports, whether a child might be in imminent danger, and the need to determine a potential geographic location of a child or reported user. After an Exploited Child Division staff member at NCMEC has determined a potential geographical location and completed processing the CyberTipline report, the report is made available to a law enforcement agency in the potential geographic location for independent review and potential investigation. CyberTipline reports are made available to law enforcement in this way through the use of a secure virtual private network owned and operated by NCMEC.

- c. Since this affidavit is being submitted for the limited purpose of securing a search warrant, I have not included each and every fact known to me concerning this investigation. I have set forth only those facts that I believe are sufficient to establish the requisite probable cause for a search warrant.
- d. Based upon my training, experience, and the information discovered during the course of this investigation, I believe that the crimes of possession of child pornography and dissemination of child pornography, which are violations of Massachusetts General Laws, have been committed on a computer, cellular smart phone, and/or digital devices capable of accessing the Internet service provided by **Comcast** at the residence and/or property occupied by **Warren Dunn (DOB: 5/27/1953) located at 1187 Nantasket Ave, Apt 2, Hull, MA.** The facts provided to me establishing the grounds for my request to the court for the issuance of a search warrant are as follows:
  1. The Massachusetts State Police Cyber Crime Unit/Internet Crimes Against Children (ICAC) Task Force was assigned to investigate a CyberTipline Report from the National Center for Missing and Exploited Children (NCMEC) regarding an incident involving the dissemination of child sexual abuse imagery (CSAI) over the Internet. The Massachusetts State Police ICAC Task Force receives NCMEC CyberTipline reports (CTR) for various incidents, and most commonly they involve the sexual exploitation of children over the Internet. The ICAC Task Force is a national task force of investigators who investigate offenders using the Internet or other online technology to sexually exploit children.
  2. On Monday, April 27, 2020, Sergeant James Dowling, the Internet Crimes Against Children (ICAC) Task Force Coordinator for Massachusetts forwarded CyberTipline Report(s)

Affidavit of Trooper Gerald F. Donovan, #3424

Page 5 of 13

(CTR) #66065219 dated March 18, 2020 at 02:13:35 UTC from the National Center for Missing and Exploited Children (NCMEC) regarding reports NCMEC received from Microsoft (Submitter: Microsoft - Online Operations Microsoft OneDrive, Business Address: One Microsoft Way Redmond, WA 98052 United States).

3. I know that Microsoft owns OneDrive with open source search defining OneDrive as, *"Microsoft OneDrive, or commonly known as OneDrive, is a file hosting service and synchronization service operated by Microsoft as part of its web version of Office. First launched in August 2007, OneDrive allows users to store files and personal data like Windows settings or BitLocker recovery keys in the cloud, share files, and sync files across Android, Windows Phone, and iOS mobile devices, Windows and macOS computers, and the Xbox 360 and Xbox One consoles. Users can upload Microsoft Office documents to OneDrive. OneDrive offers 5 GB of storage space free of charge, with 100 GB, 1 TB, and 6 TB storage options available either separately or with Office 365 subscriptions...OneDrive is a cloud storage service from Microsoft that allows you to store all your important files securely in one place and then access them virtually anywhere. It works just like a traditional hard drive, but it's on the internet, and you get access to additional features."*

4. Microsoft reported the following information (excerpt):

**1. CyberTipline Report #66065219 dated March 18, 2020 at 02:13:35 UTC:**

Incident Type:	Child Pornography (possession, manufacture, and distribution)
Incident Time:	01-02-2020 21:37:08 UTC
Description of Incident Time:	Incident Time reflects when image/video was scanned

Peer-to-Peer Client:	OneDrive
IP Address:	24.34.25.108 at 01-02-2020 21:37:09 UTC
Peer to Peer Filenames:	2c8d5e17-12c5-412e-b359-914a3e64868a.jpg

Peer-to-Peer Client:	OneDrive
IP Address:	24.34.25.108 at 01-02-2020 21:37:08 UTC
Peer to Peer Filenames:	c41d561a-95c9-4939-ab60-6cd12b8b4a6a.jpg

Image Categorization by ESP: B2

*NOTE: Image Categorization A1 is defined by NCMEC as a prepubescent minor in any image of sexually explicit conduct (actual or simulated sexual intercourse including genital-genital, oral-genital, anal-genital, or oral-anal whether between person of the same or opposite sex), bestiality, masturbation, sadistic or masochistic abuse, degradation, or any such depiction that lacks serious literary, artistic, political, or scientific value. Image Categorization A2 is defined by NCMEC as a prepubescent minor in any image depicting nudity and one or more of: restraint, sexually suggestive poses, focus on genitals, inappropriate touching, adult arousal, spreading of limbs or genitals, and such depiction lacks serious literary, artistic, political, or scientific value. Image Categorization B1 is defined by NCMEC as a pubescent minor in any image of sexually explicit conduct (actual or simulated sexual intercourse including genital-genital, oral-genital, anal-genital, or oral-anal whether between person of the same or opposite sex), bestiality, masturbation, sadistic or masochistic abuse, degradation, or any such depiction that lacks serious literary, artistic, political, or scientific value. Image Categorization B2 is defined by NCMEC as a pubescent minor in any image of lascivious exhibition depicting nudity and one or more of: restraint, sexually suggestive poses, focus on genitals, inappropriate*

Affidavit of Trooper Gerald F. Donovan, #3424

Page 6 of 13

touching, adult arousal, spreading of limbs or genitals, and such depiction lacks serious literary, artistic, political, or scientific value.

5. Microsoft reported there were two uploaded files in the CTR, which was viewed by a member of Microsoft. I have viewed the file and determined it is in violation of Massachusetts General Laws Chapter 272 § 29C pertaining to the Possession of Child Pornography statute. The following is a brief description of the image:

**1. CyberTipline Report #66065219 dated March 18, 2020:**

FileName: **2c8d5e17-12c5-412e-b359-914a3e64868a.jpg**

Description: This image depicts a pubescent male standing completely naked with the focus of the image on the young boy's penis. The young boy is approximately 13 to 15 years of age.

FileName: **c41d561a-95c9-4939-ab60-6cd12b8b4a6a.jpg**

Description: This image depicts a pubescent male standing completely naked with the focus of the image on the young boy's penis. The young boy is approximately 13 to 15 years of age.

6. Sergeant Dowling accompanied the aforementioned CTR(s) with an Attorney General's administrative subpoena to Comcast for Internet Protocol (IP) address **24.34.25.108 assigned on 01-02-2020 at 21:37:09 UTC** with the Comcast results reporting the following:

Subscriber Name: WARREN DUNN  
Service Address: 1187 NANTASKET AVE APT 2, HULL, MA 02045  
Billing Address: 1187 NANTASKET AVE APT 2, HULL, MA 02045  
Telephone #: (781) 925-3104  
Type of Service: High Speed Internet Service  
Account Number: 8773102160220531  
Start of Service: 12/03/2018  
Account Status: Active  
IP Assignment: Dynamically Assigned  
sE-mail User Ids: wdnn1187

7. An open source search of the Hull Town Assessor's online database showed 1187 Nantasket Ave, Apt 2, Hull is owned by Warren Dunn and Robert MacAuley since 1985. The RMV query showed Warren W. Dunn (DOB: 5/27/1943) is a Level 2 Sex Offender out of the subscriber's address in Hull.

8. The two images reported in the CTR were sent to the National Center for Missing and Exploited Children (NCMEC) Law Enforcement Services Portal (LESP). The Hash Search is described by NCMEC as *"The Hash Search tool is a service of the Child Victim Identification Program (CVIP) and assists law enforcement officers and prosecutors in performing an initial assessment during child pornography investigations. Law enforcement can use the Hash Search function to compare MD5 or SHA1 hash values calculated from suspected child pornography images and videos with hash values stored in the CVIP system. Once the hash values are submitted to LESP, a report is generated which categorizes submitted hashes as follows:*



- *Identified Child* - These exact hash values are associated with an image/video which appears to depict at least one (1) child previously identified by law enforcement. Please be advised that these hash values may be associated with apparent child pornography images/videos as well as files that do not contain apparent child pornography.
- *Recognized Hash Values* - These exact hash values are associated with files previously submitted to NCMEC's Child Recognition and Identification System. However, NCMEC has no additional information regarding these files, which may or may not contain apparent child pornography or depict identified children. As a result, these hash values will not be listed in the pdf version of the NCMEC Initial Hash Value Comparison Report.
- *Unrecognized Hash Values* - These exact hash values are associated with images/videos that have not yet been submitted to NCMEC's Child Recognition and Identification System."

NCMEC reported the two images were **recognized** hash values.

9. On Wednesday, May 27, 2020, at approximately 11:40PM, I traveled by 1187 Nantasket Ave, Apt 2, Hull. I conducted a WiFi site survey from near the residence finding only the following private networks: Fios-4VtZJ, FiOS-H2OLJ, HOME-DE5B-2.4, Mikeking174, Pmiller77, Private wifi and UJND2. I observed Warren Dunn's Honda Accord bearing MA 143YWN parked at the edge of the complex parking lot.

10. Detective Reilly of the Hull Police Department forwarded the investigative report related to Warren Dunn's arrest on June 24, 2007. The report indicated there were various media forms containing child pornography of boys as young as 10 years old seized from Unit 2. An interview was conducted post-Miranda where Warren made several admissions consistent with Hull PD's investigation.

Detective Reilly provided further information indicating Warren's apartment in Building 1187 was Unit 2 on the ground floor with a large double window sliding door.

*NOTE: An unprotected wireless network within a residence could be used by someone outside the residence to access the Internet if the signal was strong enough to allow someone outside the residence to detect and connect to the router associated with that unprotected wireless network. However, even if an unprotected wireless network was detected in the vicinity of the residence, it would be very difficult, if not impossible, to determine with reliability that the location to be searched does in fact have an open wireless network, that someone outside that residence is accessing the open wireless network to gain access to the Internet, and determine who that person is without searching a wireless router 1187 Nantasket Ave, Apt 2, Hull, MA.*

11. Based on the above information, and my own personal knowledge and belief, I believe probable cause exists for the issuance of a search warrant in order to further this investigation and I therefore respectfully seek the permission of the court to search the residence of/property occupied by **Warren Dunn (DOB: 5/27/1953) located at 1187 Nantasket Ave, Apt 2, Hull, MA**, for evidence related to the crimes of possession of child pornography and dissemination of child pornography, which are in violation of Massachusetts General Laws.

5. SPECIAL INFORMATION PERTAINING TO THE SEXUAL EXPLOITATION OF CHILDREN AND COMPUTER / DIGITAL EVIDENCE SEARCHES:

a. Based upon my training, experience, and conversations with other investigators with whom I have worked with and have participated in CHILD EXPLOTTATION criminal investigations

Affidavit of Trooper Gerald F. Donovan, #3424

Page 8 of 13

that involve computers / digital evidence and digital devices such as tablets, cellular telephones, and smart phones, I know:

1. That digital evidence, such as computers, tablets, cellular telephones / smart phones (i.e. iPhone's, Samsung Galaxy cell phones), removable media and related digital devices may contain evidence which will aid in establishing the identity of the perpetrator(s), the circumstances under which the crime was committed and/or which in general will assist in the discovery of the pertinent facts; and that such investigation requires a systematic search to locate, seize, record, and process all evidence.

III 2. I know from training and experience that those who have possessed and/or disseminated child pornography have an interest or preference in the sexual activity of children. Those who have demonstrated an interest or preference in sexual activity with children or in sexually explicit visual images depicting children are likely to keep secreted, but readily at hand, sexually explicit visual images depicting children. In some instances, these depictions are actual photographs or images of the suspect's own sexual activity with past or present children. In some instances, the suspect keeps these depictions as a means of plying, broaching, or titillating the sexual interests of new child victims or otherwise lowering the inhibitions of other potential child sexual partners by showing them that other children participate in this kind of activity. Still, in other instances, the depictions are a means of arousing the suspect. These depictions tend to be extremely important to such individuals and are likely to remain in the possession of or under the control of such an individual for extensive time periods. Although he might, a person who has this type of material is not likely to destroy the collection. These sexually explicit visual images depicting children can be in the form of, but not limited to, negatives, slides, books, magazines, videotapes, photographs or other similar visual reproduction, or by an image/video depiction by computer.

IV

3. I know from training and experience that persons trading in, receiving, distributing or possessing of images or movies involving child pornography will make copies of those files on their computer's hard drive, digital devices such as tablets, cellular telephones, and smart phones, or other removable media. These computer / digital device storage media devices can be and have been found within the person's residence, on the person, and within their motor vehicles. Additionally, today's computers and digital devices are smaller in design and portable, allowing persons to more easily transport their devices.

V 4. I know from my training and experience that even if the files were deleted by a user, they still may be recoverable by a trained computer forensic examiner. Today's enormous hard disk drives (HDD) store information for indefinite amounts of time, even in slack space. Slack space refers to portions of a hard drive that are not fully used by the current allocated file (files saved on the HDD) and which may contain data from a previously deleted file.

VI

VII 5. I know from training and experience that persons trading in, receiving, distributing or possessing images or movies involving the exploitation of children or those interested in the actual exploitation of children often communicate with others through correspondence or other documents (whether digital or written) which could tend to identify the origin of the images as well as provide evidence of a person's interest in child pornography or child exploitation.

VIII

IX 6. I know from training and experience that individuals who have a sexual interest in children and have access to the Internet will conduct searches for child pornography and child sex stories on the Internet using Internet search engines or other programs that share files via the Internet. These individuals will use terms that are associated with children, nudity, and sex. These searches can be found within Internet history files, such as Internet Explorer History, or within unallocated areas of the hard drive.

X

XI 7. I know from training and experience that files related to the exploitation of children found on computers are usually obtained from the Internet using application software which often leaves files, logs, or file remnants which would tend to show the exchange, transfer, distribution, possession, or origin of the files.

XII

XIII 8. I know from training and experience that computers used to access the Internet usually contain files, logs, or file remnants which would tend to show ownership and use of the computer as well as ownership and use of Internet service accounts used for the Internet access. I know it's going to be important to determine who was using each computer / digital device when certain data was manipulated on that device. Digital evidence examiners must be able to examine time line evidence and other metadata of all data on all computers / digital devices seized, including that which is not directly related to the crimes alleged in the search warrant, in order to determine who was using the particular device at the relevant and significant times. What constitutes "custody" and "control" evidence will vary from case to case and cannot be predicted or particularized with great specificity.

XIV

XV 9. I know from training and experience that search warrants of residences involved in computer related criminal activity usually produces items that would tend to establish ownership or use of computers and ownership or use of any Internet service accounts accessed to obtain child pornography to include credit card bills, telephone bills, correspondence, and other identification documents.

XVI

XVII 10. I know from training and experience that search warrants of residences usually reveals items that would tend to show dominion and control of the property searched, to include utility bills, telephone bills, correspondence, rental agreements, and other identification documents.

11. I know from training and experience that individuals who have a sexual interest in children also tend to possess other material related to children that serves a sexual purpose for a given individual. Examples of such material includes child erotica, ordinary pictures or magazines of kids, fantasy stories, adolescent / child psychology books, sexual aids, kids' books, kids' videos, kids' clothing, kids' catalogues, etc.

12. There is probable cause to believe that the items detailed with particularity in section 3 of this affidavit are evidence of the sexual exploitation of children in violation of Massachusetts General Law Chapter 272 §§ 29B (governing the crime of the possession with intent to disseminate child pornography), and 29C (governing the crime of the possession of child pornography).

XVIII 13. I respectfully request that the Court issue a warrant and order of seizure, authorizing the search of the items located at the residence/property of/occupied by **Warren Dunn (DOB: 5/27/1953) located at 1187 Nantasket Ave, Apt 2, Hull, MA**, detailed with particularity in section 2 of this affidavit, and search for those items

Affidavit of Trooper Gerald F. Donovan, #3424

Page 10 of 13



detailed with particularity in section 3 of this affidavit. And with regard to any of the aforementioned computer related items / digital evidence, to transport them to an off-site secure location, to continue the search therein for and seize the evidence associated with this particular investigation.

**XIX**

*b. Request to Allow Computer Forensics Expert to Execute Search of Computer System.*

Because of the technical expertise needed to successfully execute a search of a computer system, it may be necessary to have the assistance of a qualified computer forensics and hardware expert to execute the search of the computer system without either altering evidence or otherwise compromising our ability to operate the computer in a secure forensics environment in order to search for the evidence detailed above while minimizing intrusiveness of the search and protecting officer safety. Furthermore, it may be necessary to continue to draw on that individual's expertise during the search of any seized computer system. I am respectfully requesting permission to allow a computer forensics expert, if available, to assist in the execution of the search of the computer system in furtherance of the warrant.

*c. Request to Allow Officers to Copy Digital Evidence Stored on Cloud Service Server.* I am respectfully requesting authorization to copy digital evidence stored on a server (or servers) in another location if a server can be remotely accessed from a computer (or computers), a tablet (or tablets), and/or a cell phone (or cell phones) located at the site authorized to be searched by this warrant. This authorization would permit law enforcement to preserve the integrity of such evidence and prevent it from being tampered with or destroyed. Your affiant knows, through my training and experience, that so-called "cloud service providers" are quite common. Such providers store data on remote servers that customers can access from their home or any other location with Internet access. Examples of these services include Dropbox, Google Drive, Picasa, Apple's iCloud, Microsoft SkyDrive, and Microsoft's OneDrive. These services also encompass common "web mail" such as Hotmail, Gmail and Yahoo! mail. Customers can view, alter, create, copy and print data from these remote servers as if it was at the same location as the customer. The customer typically owns and controls the data stored at the remote server while the electronic service provider owns the server on which the data is stored. In your affiant's training and experience, law enforcement commonly do not discover that a target of a search warrant is utilizing a cloud service provider until the service of a search warrant takes place. Preservation of "cloud data" accessible by computers targeted by this warrant is paramount. After a connection to a cloud computing service is discovered, it could take law enforcement hours or days to obtain a second search warrant targeted at the service provider operating that service. But it could take mere seconds for data to be deleted from that service remotely from anywhere in the world with an Internet connection. Furthermore, should a connection with a cloud computing service be closed as a result of the powering down and seizing of a computer authorized to be seized by this warrant, encryption mechanisms could prevent such a connection from being reopened and the data accessed in the future. Depending on the cloud service provider, should an open connection to the provider be closed, such encryption may not even be able to be bypassed should a warrant be served for data directly to the provider.

*d.* I ask for the specific permission of this court to search any person present in the areas designated for search, and to seize and search any and all digital devices or digital media capable of receiving, transmitting, sending, or storing digital or electronic data, information, or files, if found in possession or under the control of any person. It is important to note that modern digital media with the aforementioned capabilities are smaller than in the past and are commonly carried on or about one's person. Examples of such devices are thumb drives,

micro SD cards, cellular phones / smart phones (i.e. iPhone, Samsung Galaxy, etc.), and iPods or digital devices which are capable of accessing the Internet.

e. I also have knowledge, based upon my experience and training that if untrained persons are allowed into the premises authorized to be searched, they may unintentionally disturb, damage, or obliterate crucial evidence. Accordingly, while the search warrant is being executed, I respectfully seek the court's authority to impound and secure the premises and to keep out all unauthorized persons not assigned to the investigation.

f. I ask for the specific permission of this court to photograph any of the aforementioned areas designated for search, including locations where the computer systems were located or securely stored if that procedure is necessary for the purpose of this investigation.

6. CONCLUSION.

In conclusion, I respectfully submit that, based upon my training, knowledge, education, and experience, and based upon the facts, circumstances, investigation, and reasonable inferences detailed in this affidavit, probable cause exists to believe that the premises designated for search and detailed with particularity in section 2 of this affidavit, contain(s) evidence, contraband and/or instrumentalities of the following criminal violations of the Laws of the Commonwealth of Massachusetts presently under investigation:

- a. MGL Ch. 272 § 29B Dissemination of visual material of a child in a state of nudity or sexual conduct.
- b. MGL Ch. 272 § 29C Possession of child pornography

I therefore request the authority of the court to search the area detailed with particularity in section 2 of this affidavit. I request further the authority of the court to seize and search any and all items detailed with particularity in section 3 of this affidavit.

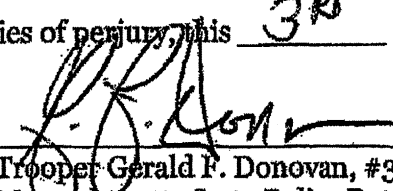
I \_\_\_\_\_ have previously submitted the same application.

I ☒ have not previously submitted the same application.

This affidavit subscribed to and sworn to by me consists of 13 pages.

Signed under the pains and penalties of perjury, this 3<sup>rd</sup> day of June \_\_\_\_\_ 2020.

Time: 1325

 #3424  
Trooper Gerald F. Donovan, #3424  
Massachusetts State Police Detective  
Cyber Crime Unit, Internet Crimes Against Children Task Force  
Division of Homeland Security and Preparedness  
124 Acton Street, Maynard, Massachusetts 01754  
Email: Gerald.Donovan@pol.state.ma.us

Then, personally appeared the above, Trooper Gerald F. Donovan, #3424, and made oath that the foregoing affidavit by him subscribed is true, on this 3<sup>rd</sup> day of June 2020.

Time: 1:36 pm

Before me,

[Signature]

Title and Name

Court

Lucy Canavan, Assh. Clerk Magistrate

Hingham District Court

Affidavit of Trooper Gerald F. Donovan, #3424

Page 13 of 13

# SEARCH WARRANT

## “ATTACHMENT 1”

DOCKET #: \_\_\_\_\_

- a. Desktop or laptop computer systems and all peripheral input and output devices.
- b. Media capable of receiving, transmitting, sending, or storing digital or electronic data, information, or files.
- c. Handheld electronic or digital devices capable of receiving, transmitting, sending, or storing digital or electronic data, information, or files including, but not limited to, MP3 players, digital cameras, portable tablet computing devices, personal digital assistants, and cellular phones.
- d. Computer system, hardware, or software applications, operating systems and documentation.
- e. Printed or written data, information, or files related to digital or electronic devices subject to seizure or otherwise indicative or related to computer accounts, Internet accounts, including printed files, information, bills, notes or similar items containing information relative to the use of the computer, user names, accounts, and passwords.
- f. Physical evidence, records, papers, or documents that indicate who is in control, custody, use, or possession of the premises designated for search.
- g. Any documents pertaining to the possession, receipt, origin, or distribution of images involving the sexual exploitation of children.
- h. Correspondence or other documents exhibiting an interest in the exploitation of children, as well as any material related to children that serves a sexual purpose for a given individual. Examples of such material includes child erotica, ordinary pictures or magazines of kids, fantasy stories, adolescent / child psychology books, sexual aids, kids' books, kids' videos, kids' clothing, kids' catalogues, etc.
- i. Visually explicit images/videos, whether on paper or its equivalent, which includes but not limited to negatives, slides, books, magazines, videotapes, photographs or other similar visual reproduction, or depiction by computer (specifically including such images/videos as stored within computer storage devices as computer data files) depicting any child known or reasonably believed to be under the age of 18 years of age, in which the child is:
  - Actually or by simulation engaged in any act of sexual intercourse with any person or animal;
  - Actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus or sex organs of the child and the sex organs of another person or animal;
  - Actually or by simulation engaged in any act of masturbation;
  - Actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, caressing involving another person or animal;
  - Actually or by simulation engaged in any act of excretion or urination within a sexual context;
  - Actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or
  - Depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child.
- j. Authorizing officers to copy digital evidence stored on a server (or servers) in another location if a server can be remotely accessed from a computer (or computers), a tablet (or tablets), and/or a cell phone (or cell phones) and located at the site authorized to be searched by this warrant. This authorization would permit law enforcement to preserve the integrity of such evidence and prevent it from being tampered with or destroyed.



- k. Authorizing officers to impound and secure the premises and to keep out all unauthorized persons not assigned to the investigation.
- l. Authorizing officers to photograph any of the aforementioned areas designated for search, including locations where the computer systems were located or securely stored if that procedure is necessary for the purpose of this investigation.
- m. Authorizing officers to allow a computer forensics expert, if available, to assist in the execution of the search of the computer system in furtherance of the warrant.
- n. Authorizing officers to search all persons present in the areas designated for search, and to seize and search any and all digital devices or digital media capable of receiving, transmitting, sending, or storing digital or electronic data, information, or files, if found in their possession or under their control. Examples of such devices are thumb drives, micro SD cards, cellular phones / smart phones (i.e. iPhone, Samsung Galaxy, etc.), and iPods or digital devices which are capable of accessing the Internet.

**Authorizing officers to secure any of the aforementioned computer related items / digital evidence and transport them to an off-site secure location, to continue the search of the computer items and computer storage devices for the following items, and to seize, if they be found:**

- o. Any computer data files or cellular/smart phone data files, data, or other similar visual reproduction containing any sexually explicit visual images/videos or depiction by computer, of any child whom the person knows or reasonably should know to be under the age of 18 years of age and such child is:
  - Actually or by simulation engaged in any act of sexual intercourse with any person or animal;
  - Actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus or sex organs of the child and the sex organs of another person or animal;
  - Actually or by simulation engaged in any act of masturbation;
  - Actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, caressing involving another person or animal;
  - Actually or by simulation engaged in any act of excretion or urination within a sexual context;
  - Actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or
  - Depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child.
- p. Computer or cellular/smart phone data files, records, logs associated with any of the above described files which may identify, trace, or record the facts, including but not limited to the date, time, modification, alteration, transmission or receipt via the Internet or other networks of any of the computer files described above, including, but not limited to file menus, Internet browser history, cache directories, registry entries, logs, and files.
- q. Computer or cellular/smart phone data files in the form of email, instant messaging, chat logs, or other communication logs, the contents of which involves the attempt to find, pose or exhibit a child in state of nudity or sexual conduct, possess, acquire, store, or distribute child pornography.
- r. Internet searches, stored within a computer data file or cellular/smart phone data file, using Internet search engines or file sharing programs for child pornography.



- s. Computer files or cellular/smart phone files and/or data that assist in identifying use, custody, control, or ownership of the computer systems and the removable storage devices.
- t. Computer files or cellular/smart phone files and/or data that contain passwords, access codes, usernames, or other identifiers necessary to examine or access items, software, or information seized.
- u. Computer data files or cellular/smart phone files and/or data containing the following terms:

**Peer-to-Peer Client:**

**Microsoft OneDrive**

**IP Address:**

**24.34.25.108**

**Filename(s):**

**2c8d5e17-12c5-412e-b359-914a3e64868a.jpg**

**c41d561a-95c9-4939-ab60-6cd12b8b4a6a.jpg**

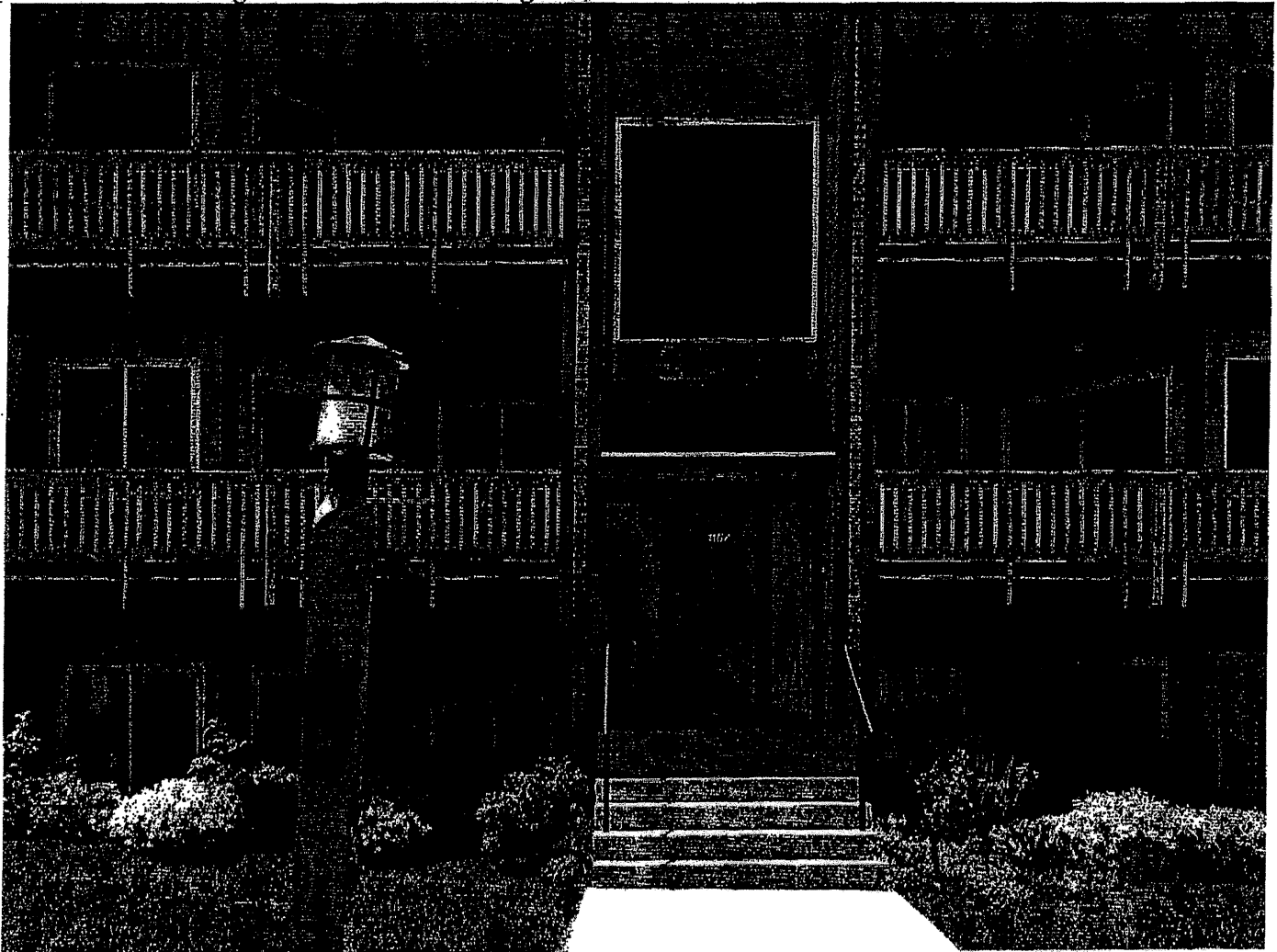
# SEARCH WARRANT

## "ATTACHMENT 2"

DOCKET #: 205854 019

### DESCRIPTION OF THE PLACE TO BE SEARCHED:

From the road, the building is more particularly described as a string of connected apartment buildings. Building 1187 has a glass front door with the numerals '1187' on the glass door. Apartment 2 is inside on the ground floor of Building 1187.



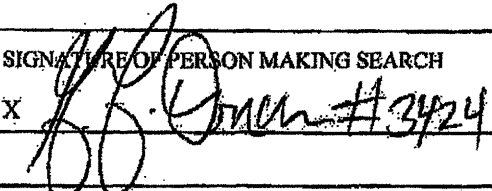

1187 Nantasket Ave, Apt 2, MA

# RETURN OF OFFICER SERVING SEARCH WARRANT

A search warrant must be executed as soon as reasonably possible after its issuance, and in any case may not be validly executed more than 7 days after its issuance. The executing officer must file his or her return with the court named in the warrant within 7 days after the warrant is issued. G.L. c.276, '3A.

This search warrant was issued on	June 3, 2020 (SW 2058SW019)	and I have executed it as follows:
The following is an inventory of the property taken pursuant to this search warrant:		
On June 3, 2020 at approximately 4:30PM the search warrant was executed at 1187 Nantasket Ave, Apt 2, Hull. The following item(s) were seized:		
<ol style="list-style-type: none"> <li>1. One Acer Chromebook S/N: NXGHJAA009828072D67600</li> <li>2. One iPhone 8 Plus S/N: FD2ZG6FQJCLY</li> <li>3. One 32GB thumb drive "ONN" ONA19DS005</li> <li>4. One empty CHUWI Vi8 Tablet Box</li> </ol>		

(Attach additional pages as necessary)

This inventory was made in the presence of: Trooper Andrew Adair		
I swear that this inventory is a true and detailed account of all the property taken by me on this search warrant.		
SIGNATURE OF PERSON MAKING SEARCH X 	DATE AND TIME OF SEARCH June 3, 2020 @ 4:30PM	SWORN AND SUBSCRIBED TO BEFORE X  Signature of Justice, Clerk-Magistrate or Assistant Clerk
PRINTED NAME OF PERSON MAKING SEARCH Trooper Gerald Donovan #3424	TITLE OF PERSON MAKING SEARCH State Police Detective	DATE SWORN AND SUBSCRIBED TO 06/04/2020 - Paul Fullam

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH,ss

SUPERIOR COURT  
DOCKET NO.: 2183CR85

COMMONWEALTH OF MASSACHUSETTS )  
 )  
v. )  
 )  
WARREN DUNN )

AFFIDAVIT OF COUNSEL

Under oath, I depose and state the following to be true to the best of my knowledge and belief:

1. My name is Sabrina Bonanno and I represent the defendant in the above entitled matter.
2. I have reviewed the search warrant application, police reports, grand jury minutes, and discovery produced by the Commonwealth in this matter.
3. I have researched the statutes and case law pertaining to this matter.
4. I have represented countless individuals charged with Possession and Dissemination of Child Pornography offenses in district court, superior court, and federal court. As part of my representation, I have viewed hundreds if not thousands of child pornography images and/or videos. Based upon information and belief, the focal point of the two images was not the male's penis contrary to the affiant's assertion in the affidavit filed in support of the search warrant application.
5. Based upon information and belief, the two images were not attached to the search warrant application and therefore the magistrate did not make an independent determination that the images constituted child pornography as defined by Massachusetts law.


Signed this 29 day of September 2021 under the pains and penalty of perjury.

  
Sabrina Bonanno

CERTIFICATE OF SERVICE

I, Sabrina Bonanno, hereby certify that on this 30th day of September 2021, I have served a true copy of the foregoing Defendant's Motion for Franks Hearing, Defendant's Motion to Suppress Search Warrant, Memorandum of Law in Support of Motion for Franks Hearing and Motion to Suppress Search Warrant, Exhibit A: Search Warrant, and Affidavit of Counsel by electronic mail and first-class mail postage prepaid upon the following:

Plymouth District Attorney's Office  
166 Main Street  
Brockton, MA 02301  
Attn: ADA Amanda Fowle

  
\_\_\_\_\_  
Sabrina Bonanno

10-18-21  
(12)

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT

DOCKET NO. 2183-85

FILED  
COMMONWEALTH OF MASSACHUSETTS  
SUPERIOR COURT DEPT. OF THE TRIAL COURT  
PLYMOUTH COUNTY

COMMONWEALTH

vs.

WARREN DUNN

OCT 18 2021

  
Clerk of Court

---

COMMONWEALTH'S MOTION IN OPPOSITION TO DEFENDANT'S MOTION FOR  
A *FRANKS* HEARING AND MOTION TO SUPPRESS

---

Now comes the Commonwealth in the above-captioned matter and respectfully moves this Honorable Court to deny the Defendant's Motion for a *Franks* hearing and motion to suppress for the reasons stated herein.

As grounds in support of this motion, the Commonwealth states that the Defendant has not properly raised a *Franks* issue to warrant an evidentiary hearing. Franks v. Delaware, 438 U.S. 154 (1978). Specifically, the Defendant's motion and affidavit fails to make a "substantial preliminary showing" that the affiant

of the search warrant in question, Trooper Gerald Donovan, either intentionally or recklessly made materially false statements in his affidavit. Franks, supra at 171-72 (allegations must be accompanied by an offer of proof); Commonwealth v. Nine Hundred & Ninety-two Dollars, 383 Mass. 764, 767-68 (1991) (same).

To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. *They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons.* Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

Franks, 438 U.S. at 71 [emphasis added].

The Defendant claims that an “independent” review of the photos shows that the focus was not on the penis of either boys. However, he does not cite what he “independent review” is. It seems, based on the information in the motion and affidavit of counsel, the “independent review” is the “review” by counsel, who is paid to represent the Defendant, and therefore is anything

but “independent”. By definition of being a paid defense attorney, Counsel has a bias in reviewing the evidence. The Commonwealth does not contend that counsel is purposefully misrepresenting information to the court, but simply that there is a failure to meet the burden regarding that there was misleading information presented to the Clerk for review of the search warrant.

The Defendant describes the first image very simply as follows “image: 2c8d5e17-12c5-412e-b359-914a3e64868a.jpg as depicting a standing nude male from the knees up, looking to the right, with trees in the background.” He fails to describe that while the face is turned to the right and the apparent juvenile male appears to be looking to the right (right as your looking at the photo, left if one were to mirror the photo), the body of the apparent juvenile male is turned in such a way that the camera is able to capture the full body, including the apparent juvenile



penis. The focal point of this photograph is very clearly not what the apparent juvenile is looking at, because no one can see that, not is it the apparent juvenile's face, because you can't see all of the face. What you can see all of is the torso and penis. Thus, indicating that the focal point of said photograph is in fact, the apparent juvenile male's genitals, as that is the most prominent part of the photograph.

He describes the second as "image: c41d561a-95c9-4939-ab60-6cd12b8b4a6a.jpg depicts male holding a rock with trees in the background." Again, however, the defendant fails to inform the court that the apparent juvenile male is facing the camera, including his body facing the camera. His torso is bent, and his arms bent to hold the rock, covering most of his torso, the rock partially to mostly hidden by his hands as he holds it. The sun is streaming into the photo, causing the juvenile male's at least semi-erect penis to cast a shadow on his right leg. He

also fails to describe that the trees appear to be blurred in the background. Where the rock is partially to mostly covered in the photo, and the trees are blurred in the background, they are clearly not the focal points of the photo.

Additionally in both photos, where the cropping of the photos starts at the knees, meaning you cannot see lower legs of the apparent juvenile males or their feet, it helps to indicate what the focal point of the photo is. If there were not a focus on the genitals, the cropping of the photo could have removed that area of the photo.

Based on the fuller descriptions of the photographs it is apparent that the descriptions contained within the affidavit are not at all misleading. Particularly when combined with the fact that the person describing them has had specialized training in recognizing such photographs and conducting these investigations. This seems to be more extensive than the

“independent review” that the defendant claims took place, but cites to no information about the qualifications of that “independent review”. Again, leaving one to believe based on Counsel’s affidavit, that the alleged independent review was her own personal review.

When comparing this case to that of Dost or Rex, the question becomes if the focal point on the genitals is such that it is a “lascivious exhibition of the genitals or pubic area”. United States v. Dost 636 F.Supp. 828 at 833 (1986). Dost also indicates that the standard is lower for lascivious than it is for obscenity. Furthermore, one of the factors is whether or not the visual depiction is intended or designed to elicit a sexual response from the viewer. Dost also explains that what might illicit a sexual response from a pedophile viewer might be different than that of an “ordinary viewer” Dost at 832.

In this case, we are dealing with a pedophile viewer, as outlined in the affidavit, this is a defendant who has been convicted of possessing child pornography before. The Commonwealth is not saying that because of his conviction that the photographs become child pornography, but one must look at the angle, focus and cropping of the photographs to consider whether or not it could illicit a sexual response from such a viewer. To this point, the Commonwealth highlights the fact that the background of the photographs is arguable altered to a degree to ensure that the focus of the photographs is on the naked juvenile male in each photo. This is distinguishable from Commonwealth v. Rex 469 Mass. 36 (2014), because in Rex the conduct of the juveniles could easily have been the focus. Those photos were juveniles in various natural locations, or photographs where the genitals are not clearly visible. In this

case we have genitals that are clearly visible, with backgrounds that are distorted to negate their nature features.

The statement that the focus of the photo is an accurate one. Someone does not have to be the only visible part of a photo for it to be the focus point, it simply has to be the center of attention of the photo. See Commonwealth v. Sullivan 82 Mass.App.Ct. 293 (2012) (photo of an adolescent girl where the focal point was her developing breasts and to a lesser extent her pubic area because of how she was positioned in the photo, and where the viewer's attention would be drawn to based on the positioning and shadowing.)

Ultimately, the Defendant fails in his burden for a Franks hearing because he does not provide any reliable supporting reasons for his allegation that the description of the photographs by the Trooper is factually incorrect. All he has provided is a separate description, which while not inaccurate, isn't a

complete description either. Within this response, there is a more complete description of the photographs. While the trooper's description in the affidavit is brief, it is not misleading, nor is it incomplete. It is a summary of what the photograph is, despite the Defendant's biased alternate description.

The Commonwealth agrees that the description of those images is the basis for the probable cause to search the apartment and speak with the Defendant, and absent those images that were discovered initially as cyber tips and then were reviewed by trained law enforcement, there would not be probable cause to search the house. However, there is a statement given by the Defendant, post *Mrianda* where he is not in custody. The Commonwealth argues that the *Miranda* warnings to the defendant constitute an intervening factor. Therefore, even if the court were to rule that the images were not sufficient probable cause, it does not automatically suppress

all the evidence that was obtained when the police were at the house. This is a defendant who has knowledge of the judicial system and understands his rights, he was read his *Miranda* warnings and elected to talk to law enforcement, during which time he admitted to searching for pictures of boys between the ages of 16-18.

WHEREFORE, the Commonwealth respectfully requests this Honorable Court deny the Defendant's Motion for a Frank's hearing and Motion to suppress evidence.

Respectfully submitted,  
TIMOTHY J. CRUZ  
District Attorney

BY: /s/ Amanda Fowle  
Amanda Fowle  
Assistant District Attorney  
Plymouth District

Dated: 10/16/21

1-4-28 15

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT  
CRIMINAL ACTION  
NO. 2021-00085

COMMONWEALTH

vs.

WARREN DUNN

**MEMORANDUM OF DECISION AND ORDER ON  
DEFENDANT'S MOTION TO SUPPRESS SEARCH WARRANT  
AND MOTION FOR FRANKS HEARING**

The defendant Warren Dunn is before this court charged with two counts of the Purchase or Possession of Visual Material of Child Depicted in Sexual Conduct (violation of G. L. c. 272, 29C(vii)) and two counts of such crime as a subsequent offender. He now seeks suppression of physical evidence seized pursuant to a June 3, 2020 search warrant. He also seeks a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) ("*Franks* Hearing"), arguing the trooper who supplied the search warrant affidavit purposefully and recklessly mischaracterized the alleged pornographic images giving rise to his charges. For the following reasons, the defendant's Motion to Suppress is **DENIED** and his Motion for a *Franks* Hearing is also **DENIED**.

**BACKGROUND**

On October June 3, 2020, Trooper Gerald F. Donovan ("Trooper Donovan") of the Massachusetts State Police Department applied for a warrant, Search Warrant 2058SW019 ("the Search Warrant"), to search various electronic devices located at 1187 Nantasket Avenue, Apartment #2 in Hull ("Nantasket Avenue Apartment"). Per the Search Warrant application, Trooper Donovan sought authority to search the residence for:



“Any physical evidence, as well as any computer/cellular smart phone data files contained within the computers, cell phones, digital devices, and related digital media listed more particularly in ‘Attachment 1’ searching for child pornography as defined in Massachusetts General Laws, Chapter 272, Section 29C, which is illegal to possess and disseminate.”

Trooper Donovan supplied an affidavit in support of the Search Warrant (“the Affidavit”). In the Affidavit, Trooper Donovan provided information about his professional background in law enforcement, notably his assignments involving cybercrimes. He became a detective with the Cape and Island District State Police Detective Unit in 2013, which included an assignment as an Internet Crimes Against Children (“ICAC”) Task Force member. In this capacity, he investigated crimes involving the sexual exploitation of children on the Internet. He also attends the yearly Massachusetts Attorney General’s Cyber Crime Conference. He was assigned to the Massachusetts State Police Cyber Crime Unit at the time he submitted the Affidavit.

In the Affidavit, Trooper Donovan described a process by which the National Center for Missing and Exploited Children (“NCMEC”) investigates reports of abducted, endangered, and sexually exploited children. The NCMEC established a CyberTipline that serves as “the national clearinghouse for tips and leads about child sexual exploitation.” The CyberTipline allows public and electronic services providers (“ESPs”) to report suspected child pornography to the NCMEC, among multiple other forms of child sexual exploitation. Law enforcement personnel do “not instigate, direct, or provide guidance to NCMEC in its processing of CyberTipline reports.” In certain instances, a reporting party may submit the suspected child pornography images in connection with the CyberTipline report.

On March 18, 2020, the NCMEC received a CyberTipline report from Microsoft OneDrive (“Microsoft”) regarding images depicting suspected child pornography. Microsoft

reported two uploaded files, which were “viewed by a member of Microsoft.” Per its report, Microsoft described the image as “Child Pornography (possession, manufacture, and distribution)” and categorized the image as “B2” in the NCMEC’s reporting system. The CyberTipline describes the B2 category as “a pubescent minor in any image of lascivious exhibition depicting nudity and one or more of: restraint, sexually suggestive poses, focus on genitals, inappropriate touching, adult arousal, spreading of limbs or genitals, and such depiction lacks serious literary, artistic, political, or scientific value.”

NCMEC conducts “Hash” searches, which is a feature of the Child Victim Identification Program (“CVIP”). CVIP stores images and videos of suspected child pornography, which are assigned Hash numbers for future reference. “Law enforcement can use the Hash Search function to compare . . . hash values calculated from suspected child pornography images and videos with hash values stored in the CVIP system.” A Hash search yields one of three categorizations for images or videos: “Identified Child;” “Recognized Hash Values;” and “Unrecognized Hash Values.” The search associated with the images at issue were categorized as “Recognized Hash Values,” which are defined as:

“These exact hash values are associated with files previously submitted to NCMECs Child Recognition and Identification System. However, NCMEC has no additional information regarding these files, which may or may not contain apparent child pornography or depict identified children. As a result, these hash values will not be listed in the pdf version of the NCMEC Initial Hash Value Comparison Report.”

Trooper Donovan received this Microsoft CyberTipline report on April 27, 2020. He reviewed the images and formed the opinion that they were child pornography. The Affidavit describes both images as “depict[ing] a pubescent male standing completely naked with the focus of the image on the young boy’s penis. The young boy is approximately 13 to 15 years old.”

The Microsoft CyberTipline report also included an Internet Protocol (“IP”) address for the Microsoft user who accessed the images. The Attorney General’s Office obtained an administrative subpoena for this IP address. The subpoena revealed “WARREN DUNN” as the “Subscriber Name” and 1187 NANTASKET AVE APT 2, HULL, MA 02045” as both the service address and billing address. Per Hull Town Assessor’s Office records, Warren Dunn and Robert MacAuley had owned that apartment since 1985. Further, a “RMV query showed that Warren W. Dunn (DOB: 5/27/1943) is a Level 2 Sex Offender out of the subscriber’s address in Hull.”

Trooper Donovan went to the Nantasket Avenue Apartment on May 27, 2020 and observed a vehicle registered to the defendant in the parking lot to the complex. He also received a June 24, 2007 police report from a detective at the Hull Police Department, which “indicated there were various media forms containing child pornography of boys as young as 10 years old seized from Unit 2.” Additionally, that report noted that the defendant made incriminating statements to Hull police officers in connection with that investigation.

## **DISCUSSION**

### **A. Motion to Suppress**

#### **1. Standard of Review for Motions to Suppress**

Under the Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights, a search warrant may issue only on a showing of probable cause. See *Commonwealth v. Valerio*, 449 Mass. 562, 566 (2007). “In determining whether probable cause exists for a search warrant to issue, our inquiry always begins and ends with the four corners of the affidavit.” *Commonwealth v. Anthony*, 451 Mass. 59, 68 (2008) (internal quotation marks and citations omitted). “To establish probable cause to search, ‘an affidavit

must contain enough information for an issuing magistrate to determine that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues.” *Commonwealth v. Cruz*, 430 Mass. 838, 840 (2000), quoting *Commonwealth v. Cinelli*, 389 Mass. 197, 213 (1983).

In making this determination, the court considers only the affidavit upon which the magistrate made the finding and reads it “as a whole, not parsed, severed, and subjected to hypercritical analysis.” *Commonwealth v. Blake*, 413 Mass. 823, 827 (1992). A magistrate “may apply common knowledge and may draw reasonable inferences from the facts before him” when finding probable cause to issue a search warrant. *Commonwealth v. Taglieri*, 378 Mass. 196, 198 (1979). The court “give[s] considerable deference to the magistrate’s determination[,] and even the resolution of doubtful or marginal cases should be largely determined by the preference to be accorded to warrants.” *Commonwealth v. Luthy*, 69 Mass. App. Ct. 102, 107-108 (2007) (internal quotation marks and citations omitted).

## **2. Analysis**

The defendant argues that the Affidavit was not supported by probable cause because Trooper Donovan failed to attach the two images. This argument is without merit, however, because the specificity of the images’ descriptions, and other corroborative information, supplied the necessary probable cause.

### **a. Specificity of the Description**

The defendant, relying upon *United States v. Brunette*, 256 F. 3d 14 (2001) (“*Brunette*”), argues the Affidavit’s description of the images was vague and the magistrate could not assess probable cause without reviewing the photographs. In *Brunette*, the United State Court of Appeals for the First Circuit (“First Circuit”) held that a particular search warrant was

insufficient because the magistrate did not review the suspected child pornography before issuing the warrant. *Id.* at 18. A customs agent provided the search warrant affidavit in that case, and “[t]he evidence on the nature of the images consisted solely of [the agent’s] legal conclusion parroting the statutory definition.” *Id.* at 17. More specifically, the First Circuit quoted language from the ruling by the lower court, the United States District Court for the District of Maine, stating “it appears that [the agent’s] assertion in his warrant affidavit that the images depicted ‘a prepubescent boy lasciviously displaying his genitals,’ was an attempt on his part to mirror the language of 18 U.S.C. § 2256(2)(E) . . . .” *Id.*

Much like the federal statute at issue in *Brunette*, Massachusetts also has a specific statute criminalizing possession of child pornography, G. L. c. 272, § 29C. This statute lists multiple types of materials that may be deemed pornographic. The defendant’s indictments are pursuant to subsection (vii) of the statute, which states in part:

“Whoever knowingly purchases or possesses a negative, slide, book, magazine, film, videotape, photograph or other similar visual reproduction, or depiction by computer, of any child whom the person knows or reasonably should know to be under the age of 18 years of age and such child is:

...

(vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child . . . .”

The statute does not define the term “lewd” and “[i]t is well settled that nudity alone is not enough to render a photograph lewd.” *Commonwealth v. Rex*, 469 Mass. 36, 43-44 (2014) (citation omitted). In defining lewdness in the context of child pornography, the Supreme Judicial Court (“SJC”) adopted the criteria set forth in *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986) (“the *Dost* Factors). See *Rex*, 469 Mass. at 44-45. The *Dost* Factors consider:

- “1) whether the focal point of the visual depiction is on the child’s genitalia or pubic area;
- 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
- 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- 4) whether the child is fully or partially clothed, or nude;
- 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; [and]
- 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.”

*Id.* at 44-45, citing *Dost*, 636 F. Supp. at 832.

Here, Trooper Donovan’s statement did not merely “parrot” or “mirror” the statutory definition of child pornography under G. L. c. 272, § 29C. He was not offering a legal opinion or simply use the term “lewd.” Instead, consistent with the *Dost* Factors, Trooper Donovan stated that each image “depicts a pubescent male standing completely naked **with the focus of the image on the young boy’s penis**. The young boy is approximately 13 to 15 years old.” (emphasis added). This description provided the magistrate with factual, rather than legal, information to determine whether the *Dost* Factors applied. In this regard, the Affidavit is critically distinguishable from the affidavit in *Brunette*, and the issuing magistrate was not bound by the same requirement to review the photograph in determining probable cause.

#### **b. Additional Corroborative Information**

Other aspects of the Affidavit further supported the magistrate’s finding of probable cause to issue the search warrant. The Affidavit supplied information regarding the how ICAC learned of the images. This supplemental information is important, because *Brunette* did not

create a bright-line rule requiring that an issuing magistrate review photographs. Indeed,

*Brunette* cites *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986), which states:

“Contrary to the position apparently taken by the Justice Court in the instant case, we have never held that a magistrate must personally view allegedly obscene films prior to issuing a warrant authorizing their seizure. See *Lee Art Theatre, Inc. v. Virginia*, 392 U.S., at 637, 88 S.Ct., at 2104. On the contrary, we think that a reasonably specific affidavit describing the content of a film generally provides an adequate basis for the magistrate to determine whether there is probable cause to believe that the film is obscene, and whether a warrant authorizing the seizure of the film should issue.”

*P.J. Video, Inc.*, 475 U.S. at 874 n. 5.

Here, two reports were generated before ICAC even learned of the images. First, Microsoft submitted a CyberTipline report alerting the NCMEC of suspected child pornography. Per its report, Microsoft categorized the images as B2, which includes “a pubescent minor in any image of lascivious exhibition depicting nudity and one or more of . . . focus on genitals . . . and such depiction lacks serious literary, artistic, political, or scientific value.” This description is consistent with the *Dost* Factors in identifying pornography.

Second, the NCMEC provided this information to ICAC, which triggered the law enforcement investigation. The NCMEC takes certain internal steps in assessing whether images depict child pornography. This includes references to Hash searches. Here, the images were designated as “Recognized Hash Values.” The designation does not necessarily confirm that the images constituted child pornography. However, the designation does raise the reasonable inference that another individual or entity questioned the images’ legality and considered them to constitute child pornography.

In reviewing these issues in making a probable cause analysis, the issuing magistrate was not required to expressly find that the images were child pornography. Instead, a magistrate may draw reasonable inferences based upon the facts asserted in reaching such conclusions. See



*Taglieri*, 378 Mass. at 198. Here, the issuing magistrate could reasonably rely upon this supplemental information contained within the Affidavit in assessing probable cause. Microsoft and NCMEC are not tasked with prosecuting child pornography cases, but instead operate as relatively neutral third-parties attempting to seek out and prevent dissemination of child pornography. Their reports were reasonably reliable for the magistrate to consider in issuing the Search Warrant.

Additionally, the defendant was previously investigated in connection with child pornography. He made incriminating statements regarding the child pornography during that investigation. Such pornography involved boys as young as ten years old, which is similar to the age range Trooper Donovan identified in the images at issue. Further, the defendant was registered as a Level 2 Sex Offender. While this earlier possession of child pornography and sex offender status do not definitively establish that the defendant would also possess such illicit images in 2020, this this earlier activity raised a reasonable belief that he engaged in similar activities at the time Trooper Donovan prepared the Affidavit.

Based on the totality of the evidence contained within the Affidavit, the court concludes that the magistrate reasonably determined that the Search Warrant was adequately supported by probable cause.

**B. Motion for *Franks* Hearing**

**1. Standard of Review for a *Franks* Hearing**

The defendant argues he is entitled to a *Franks* hearing because Trooper Donovan's description of the images was materially false. A defendant is

"entitled to a *Franks* hearing only if he makes two substantial preliminary showings. First, the defendant must demonstrate that the affiant included a false statement knowingly and intentionally, or with reckless disregard for the truth or intentionally or recklessly omitted material in the search warrant affidavit. Second, the defendant must



show that the allegedly false statement is necessary to the finding of probable cause, or that the inclusion of the omitted information would have negated the magistrate's probable cause finding."

*Commonwealth v. Andre*, 484 Mass. 403, 407–408 (2020) (citations and internal quotation marks omitted).

## 2. Analysis

The defendant's *Franks* argument turns on whether the penis depicted in the images was the focal point of the image. He describes one image as depicting "a standing nude male from the knees up, looking to the right, with trees in the background." He describes the other image as depicting "a nude male holding a rock with trees in the background." In this regard, he states that "[i]ndependent review of these images . . . shows that the focus was not on the penis of either boy. Rather, these photographs were more akin to National Geographic type images or nudist beach images." This differs from Trooper Donovan's assessment that the images depicted child pornography and that the penis was the focal point.

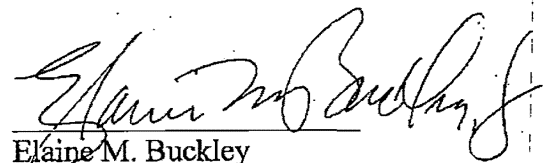
The defendant has failed to assert a sufficient legal or factual basis to demonstrate that Trooper Donovan's characterization of the images was intentionally or recklessly false. See *Commonwealth v. Ramos*, 402 Mass. 209, 215 (1998) ("The defendant merely challenged the veracity of the police officer's affidavit by offering his own account of the events in question. This does not rise to the level of a substantial preliminary showing of intentional falsity or reckless disregard for the truth in the affidavit accompanying the warrant."). Here, the defendant's descriptions of the images merely reflect a different interpretation of what the images depict. That interpretation, however, does not establish that Trooper Donovan intentionally or recklessly provided a false description of the images within the Affidavit, or even that Trooper Donovan's assessment was wrong.

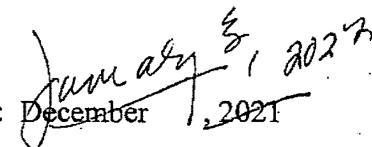
Moreover, Microsoft's designation of the images as a CyberTipline B2 category also belies the defendant's "National Geographic" characterization. Per Microsoft's designation, the images reflected "a pubescent minor in any image of lascivious exhibition depicting nudity and one or more of . . . focus on genitals . . . and such depiction lacks serious literary, artistic, political, or scientific value." Thus, the B2 description, as applied to the images here, is consistent with the *Dost* Factors identifying child pornography.

Additionally, as discussed above, there were several other factors supporting a reasonable belief that the images depicted child pornography. This supplemental information established probable cause, even if Trooper Donovan's characterizations were excised under a *Franks* analysis. Microsoft flagged the images as child pornography; the photographs were in a NCMEC database; and the defendant, a Level 2 Sex Offender, had previously been found in possession of child pornography. Accordingly, the issuing magistrate had a sufficient basis to find probable cause to issue the Search Warrant, irrespective of Trooper Donovan's characterization of the images.

### **ORDER**

For the foregoing reasons, the defendant's Motion to Suppress is **DENIED** and his Motion for a *Franks* Hearing is also **DENIED**.

  
Elaine M. Buckley  
Justice of the Superior Court

Dated:  January 3, 2022  
December 1, 2021

28

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH,ss

SUPERIOR COURT  
DOCKET NO.: 2183CR85  
PLYMOUTH COUNTY

COMMONWEALTH OF MASSACHUSETTS )  
 )  
v. )  
 )  
WARREN DUNN )

AUG 26 2022

  
Clerk of Court

AGREEMENT TO PLEA PRESERVING APPELLATE REVIEW


COMES NOW Warren Dunn, Defendant in the above-captioned matter, by and through the undersigned attorney, and the Commonwealth, through the undersigned assistant district attorney, and agree to reserve Mr. Dunn's appellate rights on this Court's rulings on his motion to suppress and request for a *Franks* hearing, pursuant to Mass. R. Crim. P. 12(b)(6).

Specifically, the parties agree:

1. The below ruling shall be subject to appellate review, despite Mr. Dunn's plea:
  - a. This Court's January 3, 2022 ruling denying Mr. Dunn's Motion to Suppress Search Warrant and Request for a *Franks* Hearing;
2. Reversal of the above ruling would render the Commonwealth's case not viable in the respective matter.

Respectfully submitted,  
TIMOTHY J. CRUZ  
District Attorney

BY:

  
Amanda Fowle  
Assistant District Attorney  
Plymouth District

Approved: XGF 8/26/22

Warren Dunn,  
By His Attorney,



Sabrina Bonanno  
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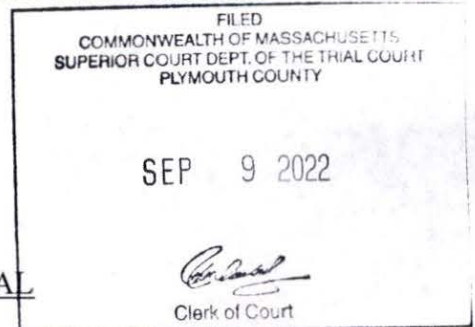
Dated: August 26, 2022

## COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH,ss

SUPERIOR COURT  
DOCKET NO.: 2183CR85

COMMONWEALTH OF MASSACHUSETTS )  
 )  
v. )  
 )  
WARREN DUNN )

DEFENDANT'S NOTICE OF APPEAL

The defendant hereby gives notice, pursuant to Rule 3 and 4 of the Massachusetts Rules of Appellate Procedure and Rule 12(b)(6) of the Rules of Criminal Procedure, of his intent to appeal the denial of his Motion for a *Franks* Hearing and his Motion to Suppress Search Warrant in the above entitled matter.

By His Attorney,

Sabrina Bonanno  
Sweeney & Associates, LLC  
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Quincy, MA 02171  
(617) 328-6900  
BBO #: 678802  
sbonanno@rsweeneylaw.com

CERTIFICATE OF SERVICE

I, Sabrina Bonanno, hereby certify that on this 6th day of September 2022, I served a true copy of the following Defendant's Notice of Appeal by first class mail postage prepaid upon the following:

Plymouth District Attorney's Office  
166 Main Street  
Brockton, MA 02301  
Attn: ADA Amanda Fowle

A handwritten signature in black ink, appearing to read 'Sabrina Bonanno', written over a horizontal line.

Sabrina Bonanno



2/10/23

32

COMMONWEALTH OF MASSACHUSETTS  
PLYMOUTH COUNTY SUPERIOR COURT

2183 CR 00085

COMMONWEALTH

v.

WARREN DUNN

FILED  
COMMONWEALTH OF MASSACHUSETTS  
SUPERIOR COURT DEPT. OF THE TRIAL COURT  
PLYMOUTH COUNTY

FEB 10 2023

*[Signature]*  
Clerk of Court

**DEFENDANT'S MOTION TO COMPEL COMMONWEALTH TO PRODUCE  
TWO PHOTOS REFERENCED IN SEARCH WARRANT APPLICATION**

Defendant Warren Dunn moves the Court to compel the Commonwealth to produce to the defense the two photos referenced in the search warrant application and used to obtain a warrant to search Mr. Dunn's computers. When Mr. Dunn pleaded guilty to the crimes herein (two counts of possession of child pornography, subsequent offenses) he reserved the right to appeal the denial of his Motion for a *Franks* Hearing and Motion to Suppress. See paper # 27. Undersigned appointed appellate counsel cannot intelligently pursue this appeal without having seen the photos on which the search warrant, and those two motions, were based.

This case involves numerous other images of what is undeniably child pornography, and the defense has no interest in accessing any of these. This motion is limited to the two photos of a nude male which were used to obtain a search warrant.

*Allowed. The photos shall be impounded for good cause shown. Counsel may view, but not copy, the impounded materials upon execution of an appropriate protective order.*

*RGK*  
*3/23/23*

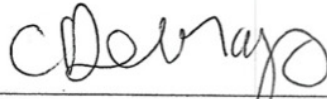
Trial counsel has returned her copy of these two photos to the Commonwealth. The District Attorney's Office has not responded to undersigned counsel's request for the photos.

The defense will of course sign any order forbidding disclosure or duplication of these photos. It is anticipated, however, that the defense will move the Appeals Court to supplement the appellate record with these two photos, and if the motion is granted, the defense will provide the Appeals Court with copies in the manner directed by that court.

Respectfully submitted,

Warren Dunn,

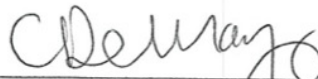
By his counsel,



CHRISTOPHER DEMAYO (BBO #653481)  
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**Certificate of Service**

I, Christopher DeMayo, certify that on this date of February 8, 2023 I served a copy of the foregoing Defendant's Motion To Compel Commonwealth To Produce Two Photos Referenced In Search Warrant Application by U.S. Mail on Amanda Fowle, ADA, Plymouth County District Attorney's Office



Christopher DeMayo (BBO # 653481)